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ABSTRACT

The law relating to charitable gifts to schools is described, and fund raising considerations are addressed. The first of four chapters, "Education Fund Raising in the Legal Context," reviews the history of the law of charity over the past 400 years (i.e., law in England during 1500-1800 and law in America during 1800-1900). "The Donor and the Law," covers questions about the propriety of particular types of gifts or trusts and how those questions affect the donor. "The Institution and the Law" deals with propriety questions as they affect the institution. In the last chapter, "Enhancing Fund Raising in the Legal Context," suggestions are made to help fund raisers influence charity legislation and public opinion to promote greater support for their institutions. The following types of charitable gifts are discussed: charitable trusts and bequests, conditional gifts, gifts of real or personal property, subscriptions, and gifts in anticipation of death. Additional topics include: tax policy and the donor, federal and state tax treatment, the charitable foundation, incorporation of charities, gift valuation for tax purposes, regulation of fund solicitation, regulation of fund administration, and charitable trustees. A glossary of legal terms and an extensive bibliography are appended. (Author/SW)

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Educational Fund Raising and the Law

by Charles T. Bargerstock

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Preface

Educational fund raising is one of the many areas of educational administration that entail major legal dimensions, a fact that I was made aware of many times during my tenure as a college development officer.

Even though I am a law school graduate and a member of the Bar of Pennsylvania, I was amazed at the range and degree of legal technicalities inherent in college fund raising. The subject was so interesting that several years later I wrote my doctoral dissertation on "An Historical-Legal Analysis of the Influence of Public Policy on Gifts from Individuals to Institutions of Higher Education" (Bargerstock, 1982).

This monograph represents a codification and update of the information in that thesis. It has been organized as a handbook or primer on the law of educational fund raising and can serve as reference for professional development or institutional advancement practitioners or institutional legal counsel. A glossary of legal terms is included.

I wish to express my appreciation to my wife Jody for her patience and support and to the fine people at Maharishi International University for their encouragement during this project. The assistance of Sheryl Albert, head of university typing, is also appreciated. Additional thanks goes to Virginia Carter Smith, vice president at CASE, for her suggestions and assistance and to Susan Hunt, whose editorial skills converted technical language into something more comprehensible.

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Introduction

As enrollments decline and costs rise, many schools, colleges, and universities are finding it increasingly difficult to maintain educational quality--and some face the more basic problem of ensuring continued survival.

Many institutions have increased educational fund-raising activities in the hope of creating additional revenues to help balance institutional budgets. New pressures are on development offices to produce the funds necessary to meet these demands.

Without a doubt, the law and the legal system have an influence on the ability of development offices to secure funds. Specifically, the operation of the law and its legal principles influences how, when, and in what manner donors may give to institutions, as well as how institutions may go about securing these gifts and then using them. This monograph has two thrusts: (1) it describes the law of charity as it has been applied to the educational sector, and (2) it suggests how educational fund raisers can use this information to enhance their efforts.

A considerable part of this monograph is devoted to describing how the law is being applied today. As background, Chapter 1 presents two fundamental aspects that underlie and permeate the current legal climate: (1) the role of public policy, that is, the rationale for judge-made or legislature-made law in determining the law of charity, and (2) the historical development of the law of charity up to the year 1900.

"Charity," in the context of this monograph and the cases discussed, can be taken to mean that portion of the charitable sector comprising schools, colleges, and universities.

Chapter 1

EDUCATIONAL FUND RAISING IN THE LEGAL CONTEXT

The influence of the law and public policy on educational fund raising is considerable. My research has led me to the following conclusions:

1. The legal principles that influence giving by individuals to institutions of higher education are found mainly in the tax law, estate and trust law, and the law of charitable dispositions.
2. These principles, which make up what we call the law of charity, are the result of various political, economic, and social factors that reflect society's ambivalence towards charity.
3. In general, the incentive dimension of the law of charity applies to the people who make the gifts and the restrictive dimension to the organizations that receive them.
4. The incentive dimension is the result of a strong tradition of giving in America. This favorable attitude towards donors is quite evident in the law and its application in the 20th century.
5. The restrictive dimension has its roots in a perceived need to limit the power and activities of the nonprofit sector. There has been some erosion of this dimension as we shall see below.
6. While most states have adopted charitable gift solicitation statutes, most also provide some degree of exemption for schools, colleges, and universities.
7. Most states have laws that regulate the administration of private donor funds by establishing the powers and duties of trustees as to the proper investment and uses of the funds. Federal policy limits the administration of scholarship funds that discriminate on the basis of race, religion, or sex.
8. The continuing debate on the role of the charitable or nonprofit sector in society is reflected in continuing change in the law to meet the changing needs of society (Bargerstock, 1982).

THE HISTORY OF THE LAW OF CHARITY

The American law of charity has its roots in England. To understand the impact of current public policy on individual giving to educational institutions, you should first examine the history of the law of charity. There were two major phases of development: the first, from the 16th through 18th centuries, concerns the development of the law in England. The second, during the 19th century, was a time when English law was adopted, modified, and expanded for use in the United States. Throughout this development, attitudes toward education helped shape specific aspects of the law in both countries.

The development of the law in England (1500-1800)

The various methods of making outright charitable gifts, which are outlined in Chapter 2, have ancient roots. The emergence of the charitable trust, however, took place in the Middle Ages. Any study of the law of charity in England should begin here.

The device of legal trusteeship, as a means for establishing charitable gifts, developed because the feudal lords had enacted restrictive acts that limited direct giving to charities, particularly to the church. To avoid these limitations, a testator (person making a will) would convey the gift to another individual who would hold it in trust for the beneficiary.

Howard S. Miller (1961) notes:

The trust owed its peculiar character to the fact that England had separate courts of law and equity. Because ordinary courts of law refused to enforce charitable trusts, the Chancellor assumed the responsibility of enforcing duties upon trustees under his equity powers. Chancery courts balanced legal title against equitable rights, giving beneficiaries an interest in property donated for their use, and protecting them in the enjoyment of that interest.

That is, courts called chancery or equity courts arose because the ordinary or common law courts would not handle certain kinds of controversies. In the law of equity, the "dictates of conscience" and the "principles of natural justice" were to be applied. By contrast common law court decisions were based on case law, that is, principles derived from decrees and judgments of the courts.

At first the charitable trust did provide a solution. However, in 1601, because procedural requirements at equity had become

much more cumbersome (in conjunction with an increase in abuses of charitable trust administration), Parliament enacted the Statute of Charitable Uses. This act simplified and ordered the prior law of charity (Jordan, 1959, p. 114; Miller, 1961, p. x).

During this same period, the courts exhibited a very favorable attitude towards charities; first, they sustained trusts or gifts that were imperfectly drawn and, second, they sustained trusts that had become defective. The second method, which is more important to us, was accomplished through the development of a legal concept that had its roots in Roman times--the cy pres doctrine.

Cy pres means "as near as possible." When compliance with the terms of a trust becomes impossible or impracticable for one reason or another, a court of equity can direct that the trust be administered "as near as possible to" the original intention of the trustor (the person who created the trust).

The favorable attitude held by the judiciary during most of the 17th century underwent a transformation from about 1680 until the mid-18th century. Indications of a more restrictive attitude by society toward charitable gifts and charities are evident not only in the case law but also in the Mortmain Act, passed in 1736. This was not the first mortmain or "dead hand" act intended to void so-called "deathbed" gifts (actually those made within 12 months of the donor's death). During the Middle Ages, feudal lords had attempted to control the accumulation of property by the church through the passage of mortmain statutes. The first was "enacted to meet the evil of land falling into the dead hand, [and] designed to protect the feudal rights of the mesne lords," and was incorporated into the Magna Charta (Jones, 1969, p. 112).

William Cobbett (cited in Jones, 1969, p. 110) suggests that the Mortmain Act of 1736 resulted from a number of "injudicious charitable gifts" that had caused considerable suffering by the heirs. He refers to a supposedly flagrant incident where a Mr. Mitchell (possibly Michel) had left a considerable estate to Queen's College, Oxford, to the detriment of his heirs. The legislation of 1736, however, seems directed mainly at the church.

The effect of the Mortmain Act was to make void all charitable gifts made either by will or by deed within 12 months of the death of the donor. And while the general impact on colleges and universities was to restrict a potentially valuable source of support, ironically, in spite of the Mitchell incident, the more prominent educational institutions of the time were legislatively exempted from the act. These included Oxford, Cambridge, Eton, Westminster, and Winchester.

Another concept, the rule against perpetuities, which matured in England during the 17th century, deserves some mention. This rule said that "no interest [e.g. in land] is good . . . unless it must vest [pass into ownership], if at all, not later than twenty-one years after some life in being at the creation of the interest" (C.J.S. Perpetuities, 2-3). The effect of the rule is to prohibit unreasonable restraint on the alienation (or transfer) of property. It means that if it is likely that the gift would not pass within the time of the rule, then it should be deemed void. The time for passing must be no later than 21 years after the death of a specific person (or persons) named in the deed or devise.

The foregoing concepts make up the significant parts of the English law of charity. This body of law was adopted and then modified in America.

The development of the law in America (1800-1900)

Much of the English legal heritage was transplanted from England to America. However, the social needs of the new land were different. It was not long before American courts and legislatures had to consider the extent to which the law in the United States should follow the principles of the English system and the extent to which it should be governed by the needs of America.

Professor Howard S. Miller describes the formulation of the law in this country as follows:

American charity law has been an organic expression of American social life, conditioned by it, yet in turn conditioning it. Complex social forces, not syllogisms or rules of precedent, have determined its content and spirit. By defining the ways in which philanthropic individuals could convey their property, to whom, and for what purposes, the law of philanthropy has helped shape the character of American society.
(p. xiii)

The Puritans in New England and the Quakers in Pennsylvania were instrumental in establishing a philanthropic tradition. In 1712, under the influence of the Quakers, the Pennsylvania Assembly passed an act to allow societies such as the Quakers to receive and hold gifts for churches, schools, and hospitals. (Because of the ex post facto nature of the statute, the Crown vetoed the act, but a revised version was passed later.)

Pennsylvania and Vermont, in 1776 and 1777 respectively, incorporated constitutional provisions that promoted the founding of charitable and nonprofit institutions.

Massachusetts and New Hampshire followed suit. In 1784 New York passed a statute favoring charitable uses, while Rhode Island and Connecticut retained similar colonial legislation when they became states.

The sentiment favoring charitable and educational institutions, however, was not universally shared throughout the United States. In 1806 Virginia's legislature enacted a statute barring gifts to religious organizations. It had also refused to act on charter petitions for incorporation made by many religious and most secular groups. In addition, a number of court decisions in Virginia and Maryland reflected a distinctly anti-charity posture. By the 1830s the restrictive "Virginia Doctrine" was firmly entrenched in Virginia and Maryland.

The United States Supreme Court initially adopted a restrictive view of what should properly be "charitable." In the case of Philadelphia Baptist Association v. Hart's Executors, 4 Wheaton 1, 4 L.Ed. 499 (1819), the Court refused to uphold a bequest for the education of Baptist youth for the ministry on the grounds that the English Statute of Charitable Uses delimited the types of permissible charitable purposes. The Court ignored the argument that British courts of chancery had upheld unusual or even defective charitable bequests prior to the 1601 statute.

The Court reversed its position 25 years later in Vidal v. Girard's Executors, 43 U.S. (2 How.) 172, 11 L.Ed. 205 (1844), when it sustained Stephen Girard's bequest to found a college for poor white orphan boys in Philadelphia. In reversing its earlier stance, the Court conceded that English chancery courts had broadly upheld a variety of charitable uses and that trusts or donations "given for the establishment of colleges, schools and seminaries of learning" were charitable.

Miller comments (1961, p. 39), "For American philanthropy, [the Girard decision] was a pledge of support from the highest court in the land." The case supplied a broad interpretation of charitable purposes, but further clarification of other aspects of the emerging law of charity was needed.

It remained the task of the state courts and legislatures to define these other aspects. The doctrine of cy pres, for instance, was not readily accepted because:

Until the middle of the nineteenth century a number of states rejected charitable trusts and hence... the need to apply the doctrine was rarely felt. Also... the belief that the doctrine was an aspect of the absolute right of kings, and hence undemocratic... created extreme judicial hostility to the doctrine. (Fisch et al., 1974, p. 413)

Gradually, the doctrine of cy pres was incorporated as part of the common law in a number of states. For example, in Pennsylvania in another lawsuit involving Stephen Girard's will, City of Philadelphia v. the Heirs of Stephen Girard, the court stated its rationale for applying cy pres:

The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the insufficiency of formal intention.... [It is] a reasonable doctrine, by which a well-defined charity, or one where the means of definition are given, may be enforced in favor of the general intent...with as close approximation to that scheme as reasonably practicable; and so, of course, it must be enforced. (45 p. 9, 27-18 (1863) (dictum))

During the latter half of the 19th century more states adopted the cy pres doctrine. The concept was acknowledged not only by the courts but also by legislatures that codified the common law concepts [i.e. principles derived from judgments of the courts] as part of the state statutory system. Some of the statutory versions, however, were even more liberal than the common law rules in establishing conditions under which a court could use cy pres to sustain a charitable trust.

Up to this point, the development of the law of charity in the United States was designed primarily to benefit the recipients of gifts. But two legal concepts of significance that emerged placed some restrictions on giving. One was the Mortmain Act. A number of American jurisdictions adopted similar provisions. The terms under which a gift would be deemed void varied. Some states modeled their acts after the English act of 1736--that is, gifts made by will within one year of the death of the testator would be void or voidable at the option of the heirs. Other states included only gifts made within 30 days of the death of the donor.

In the same fashion, the English common law rule against perpetuities was adopted and modified both by courts and by some legislatures in the U.S. But many states made a major exception to the rule; in Pennsylvania, for example, donations, bequests, or devises for any literary, scientific, charitable, or religious purposes were exempted.

Another restrictive aspect of the law was the policy of most states to limit the flexibility with which charitable trustees could invest trust funds. Some states prescribed by statute lists of proper investments for such funds. Typically, these were safe investments such as government bonds or first mortgages on land.

In Massachusetts, however, a different standard emerged--the "prudent investor" or "prudent man" doctrine, which provided broader discretion. The case of Harvard College v. Amory, 26 Mass. (9 Pick.) 446 (1830), upheld liberal investment discretion granted to the trustee by the original trust instrument. The court opinion defined the standard of conduct for a charitable trustee:

[He] shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested. (at 461)

This doctrine was not widely accepted until recent times.

SUMMARY

Today's economy has forced on educational institutions a greater dependence on donations. A sound understanding of the law of charity can enhance the efforts of professional fund raisers. The key concepts of the law of charity have developed over several hundred years and are still in use today although their application is not always the same. Their function in the modern world is analyzed in Chapters 2 and 3.

Chapter 2

THE DONOR AND THE LAW

Questions about the propriety of particular types of gifts or trusts may arise in a variety of contexts. A third party to the transaction may challenge either the right of the donor to make the gift or the specific type or form of gift. The third party may, for instance, be an heir, the Internal Revenue Service, or even another nonprofit institution.

A number of cases that have emerged from such challenges deal with the validity of the educational purposes of the recipient, the specific type or form of gift, or some tax dimension. This chapter analyzes these issues and their impact on the giver of the gift; Chapter 3 discusses the implications for the recipient.

EDUCATIONAL CHARITABLE PURPOSES

In the past in both England and America, the determination of what constitutes a valid charitable purpose has involved both legislative and judicial input. Chapter 1 discussed the Elizabethan Statute of Charitable Uses and the role of the chancery courts in this determination.

While the courts today seem to play a predominant role in defining valid charitable uses, some statutory guidelines do exist. For example, the Internal Revenue Code provisions on charitable deductions and on tax-exempt status define charitable uses for tax purposes.

Because American society has recognized the value of education, both 19th and 20th century courts have endorsed education as a charitable purpose. Fisch et al. (1974) note that while it has not been possible to fashion a comprehensive definition of education for charitable purposes, in the context of charity law, "the term education is accorded a broad meaning and no limit [is] imposed on the methods by which it can be advanced" (p. 266).

During the latter half of the 19th century, educational purposes were broadly upheld by many state courts. The case law of that period clearly demonstrates that the establishment of endowed chairs, the funding of scholarships, the construction of buildings, and so forth, are clearly valid educational purposes. The trend in the 20th century is to continue to put a broad interpretation on gifts for education.

Gifts for valid educational purposes in this century have included: land, the erection of buildings, the support or

maintenance of the physical plant, equipment or facilities, the creation of endowments, and the establishment of professorships or chairs. Gifts for student aid have also been sustained. Courts have upheld scholarships, loans, the establishment of prizes and lectures, and outright gifts to students. Courts have also held that grants for research are educational in nature and thus charitable contributions.

The point that emerges from the case law is quite clear--courts are liberal in their definition of educational purposes. They will uphold the validity of a gift or trust unless it is clearly unrelated to education or otherwise violates public policy.

TYPES OF CHARITABLE GIFTS

Private donor gifts can be categorized as intervivos or testamentary. An intervivos gift becomes effective during the life of the donor, a testamentary gift at his or her death. The gift can be outright, either absolutely or subject to condition. A gift can be made in trust for the institution, again either during the donor's life or effective at his or her death. Gifts can be designated for particular purposes; they may be restricted or unrestricted; they may be designated for current operating expenses, capital projects, or endowment. Furthermore a donor can transfer property to the institution in return for guaranteed life income in the form of an annuity trust, unitrust, pooled income fund, or gift annuity. Gifts can come in many forms besides money--real property, art objects, life insurance, stocks and bonds, and so on.

Validity of charitable gifts

The validity of a gift must be examined in the light of the laws of the state in which the transaction takes place. Much of the law relating to gifts to higher education is found in the common law, that is, the case law. A certain amount of uniformity appears among the various jurisdictions. For instance, there is relative uniformity on the major elements of a gift--donative intent, execution (or delivery), and acceptance. In general, all elements must be present for a gift to be valid.

There must be a clear intention by the donor to make the gift. This intention need not be expressed in any particular form. Thus, in the case of a delivery of a memorandum and other acts, courts have presumed these acts to constitute an expression of intention.

To be effective, the gift must also be fully executed, that is, the intention must be carried out by a completed delivery.

The delivery may be either actual, constructive, or symbolic. Delivery is a necessary element of a completely executed gift. The "sufficiency" of the delivery test must usually be applied to determine whether a gift has been executed. This is determined by an examination of the facts of the situation and surrounding circumstances. Actual manual delivery may not be required. Symbolic delivery may be sufficient under certain circumstances.

For example, let us say that a donor wishes to give a house to her alma mater. The delivery of the deed of the house to the college may be deemed by a court to be sufficient. Thus, in most situations, "where a gift is evidenced by a writing executed by the donor, delivery of the writing is a sufficient delivery to support the gift" (38 C.J.S. Gifts 22, pp. 801-803 (1943)).

The third necessary element of valid gift is the unmistakeable unconditioned acceptance of the gift by the recipient. This acceptance can be either expressed or implied from the circumstances. A college or university governing board is at liberty to reject a proposed donation for any reason. On the other hand, it is bound to any conditions, generally speaking, no matter how onerous, once the gift is accepted.

CHARITABLE TRUSTS

The charitable trust differs from an outright or absolute gift. A trust is a flexible device often used by individuals as an estate planning tool. A trust can be established to accomplish a variety of financial objectives. In its bare essentials a trust arrangement involves the transfer of assets by a settlor (the trustor) to a second party, the trustee, to be held for the benefit of another, the beneficiary. The trustee, who holds equitable title to the property, may be an individual such as an attorney or a friend, or a corporation such as a bank. A trust can be intervivos or testamentary and almost any individual or organization, including a college or university, can be the beneficiary.

Private trusts are generally established for a limited number of definite beneficiaries, whereas the charitable trust is public in nature and is established for the benefit of an indefinite set of beneficiaries. A charitable trust is defined by the Restatement of the Law of Trusts (Second) as follows:

A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable

duties to deal with the property for a charitable purpose. (1959, section 348, p. 210)

A charitable trust must meet certain basic criteria. In general these requirements include:

1. the existence of a settlor;
2. an intention to create a trust;
3. the delivery of the res (that is, the trust property);
4. a charitable purpose;
5. indefinite beneficiaries;
6. miscellaneous other requirements.

Let us examine each of these requirements.

The settlor must be qualified to create a trust. A trust, like a contract, may be invalid when the settlor is disqualified by infancy, mental incompetency, or bankruptcy.

The settlor must have manifested an intention to create a trust. Where the intention to create a trust is unclear, the court will have to ascertain intention from the "four corners of the instrument, from the circumstances surrounding the testator at the time of execution and from putting one's self in the testator's arm chair" (Kutner, 1970, p. 83).

As with the outright gift, gifts in trust require some form of delivery. Delivery and/or the declaration of the trust in a will or deed will usually cause a change of ownership.

The trust must be for a charitable purpose. As we have indicated, in the U.S., society, the courts, and the legislatures have been favorably disposed to charitable dispositions to or for the use of education.

Fisch et al. (1974) comment on the requirement of indefiniteness of beneficiaries:

Unlike a private trust which requires definite beneficiaries, indefiniteness of beneficiaries is not only characteristic of, but is an essential element of a charity.... In the sense that the community or society constitutes the real and ultimate beneficiary, all dispositions for a charitable purpose have indefinite beneficiaries. (pp. 319-20)

The test of indefiniteness, as supplied by the courts, does not require that every beneficiary be unidentified at all times, but that some of the beneficiaries are to be unknown and unidentified at some time.

This issue should be distinguished from the general legal requirement that the terms or subject matter of the trust is to be clear, definite, or definable from the circumstances. Therefore, when the existence, delivery, and acceptance of the trust property or res have been shown, a charitable trust may be upheld, even with some other element which is not well defined. For example, in Wright's Estate (131 A. 188 (Pa. 1925)) an educational trust with power to the trustee to use income for a limited period for noncharitable purposes was upheld as a charitable trust even though the trustee possessed some undefined discretion as to the use of the income.

In addition to these basic prerequisites, some states have established additional requirements. For instance, statute of frauds provisions in most states require that the proof of a trust includes something in writing.

The requirements of the statute of wills may also affect the validity of testamentary charitable trusts. If the will is invalid, gifts under it will fail. Most states have a statute of wills. Generally, a will must be drawn up in conformity with the formal statutory requisites for execution and attestation. Some states require that the will be typed and each page attached in proper order and that it be witnessed in a particular manner. Generally, if any of the statutory requirements are violated, the will and any trusts within will fail.

Attestation, for example, is the process of witnessing the signing of a will. There are certain procedural formalities that must be followed. The purpose of this is to remove any uncertainty as to the execution of the will and to safeguard the testator against fraud.

Charitable bequests

A donor may leave property, in trust or as an absolute gift, to a college, university, or school. A charitable bequest under a donor's will is the most frequent form of a deferred gift to an institution. (Other forms of deferred giving are annuity trusts, unitrusts, gift annuities, and pooled income fund gifts. Because of their tax implications these forms of deferred gifts are discussed in the section on taxes.) As with lifetime or intervivos gifts, a testamentary gift may be absolute or contingent (with limitations on its use).

A donor may bequeath cash, real estate, works of art, or other property. If the gift is in cash, the will may designate a fixed dollar amount or a proportion of the estate of residuary bequest (that is, after other specific bequests or devises have been paid). A charitable bequest may also be left in trust. Bequests may be made for a variety of educational purposes--scholarships, endowment, current operating expenses, and so on.

The first issue to be considered in regard to a charitable bequest is whether the will is valid. A will can be attacked on various grounds: it may be in violation of the statute of wills, for example. Even in a valid will, a testamentary provision may encounter other challenges. For instance, a number of cases have arisen because of uncertainty or ambiguity of provisions. Note, however, that even a quick survey of the cases shows that the courts have indulged many legal presumptions in favor of the validity of charitable devises or bequests. Charitable bequests have been declared valid even when the beneficiary was imperfectly designated; courts have declared them to be valid when the institution can be determined with reasonable certainty from the words of the will and from surrounding circumstances. And courts have applied this rule even in cases when the testator has put down the wrong name for the institution.

One limitation in these situations is that the courts follow the rules of evidence. This means, for instance, that parol evidence (oral or written evidence extrinsic to the will) cannot be used to clarify the testator's intention unless the language used in the will is not clear.

Conditional gifts

It is common for donors to make gifts with strings attached, that is, they put some restriction or requirements on their gifts. It has been estimated that only a third of voluntary support to institutions of higher education is unrestricted.

What is the effect of these conditions? What duties are created for an institution when it accepts such gifts? What happens when an institution fails to comply with a stipulation in a gift? Who will seek its enforcement? And to what extent will courts require strict compliance with any such terms?

Technically, courts can and will enforce a donor's intention that a gift be used in a particular way. A donor or his or her heirs may ask the court to require compliance with the terms of the gift or they may request forfeiture or revision of the gift to the donor or his or her estate when an institution has failed to abide by a condition.

On the other hand, the governing board of the institution may reject a proposed donation if it finds a gift's terms unacceptable. If, however, it decides to accept a gift, it must do so on the terms prescribed. Furthermore, when such conditions are accepted, there is a binding obligation that is enforceable through the courts.

There are some limitations as to what conditions courts will enforce. It can be argued that conditions should be strictly construed in situations where failure to comply with them will work a forfeiture of the gift. Courts, for instance, will not usually uphold a provision that seems to create a gift or trust, subject to a condition, where they can determine a contrary intention by looking at the entirety of the document. (This benefits the institution because an unconditional gift allows more flexibility.)

Courts will look carefully at the words of the document to determine if the gift is clearly intended to be a conditional one. Conditions will be given a reasonable construction in the light of the surrounding circumstances. The determining or guiding factor must be the intention of the donor as seen in the instrument and in the circumstances giving rise to it. When a donation to an institution is specifically conditioned, the conditions must be followed. On the other hand, when a fund is established generally for an institution, the money may be spent for any educational purpose.

A particularly sticky set of problems is posed by two types of conditions: conditions precedent and conditions subsequent. Black's Law Dictionary (4th ed., 1968, p. 366) explains the difference between the two:

A condition precedent is one which must happen or be performed...before the estate to which it is annexed can vest or be enlarged.... A "condition precedent" is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act.... A condition subsequent is one annexed to an estate already vested, by the performance of which such estate is kept and continued, and by the failure or non-performance of which it is defeated; or it is a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition.

The condition precedent requires something to happen before a right (or gift) vests. The condition subsequent is the reverse; when an event occurs, a right (or gift) is divested--that is, when an institution fails to perform the condition subsequent, the right or gift is forfeited.

As might be expected, there are potential legal problems for universities with either type of condition. For instance, with regard to a condition precedent (the condition is to occur in the future), the gift will fail if the condition does not occur. If no time for performance of the condition is stated, the condition must be performed within a reasonable time. This may be long or short as determined by the court, based on the circumstances of each case.

For example, in Grant University v. Fruit's Estate (177 Wis. 260, 94 N.W. 42 (1903)), the court held that because the university had not complied with a condition to create a scholarship in the donor's name, the promise to create an endowment was not binding. The university's claim against the donor's estate was denied.

When a donor limits his or her gift to a particular purpose by a condition subsequent, if the institution breaches the condition created by the limitation, the donation is forfeited. However, conditions subsequent, especially those applicable to nonprofit institutions, are not favored by the courts, which find them to be opposed to the public interest. Therefore, the donor's intention to create a condition subsequent must be clearly expressed. (See the discussion of Patterson's Estate below.)

CHARITABLE GIFTS AND THE LAW

While a donor may choose from several different types of gifts, specific problems may arise with any one of them. And in any gift to an educational institution, there are certain legal requirements and restraints that must be complied with.

Subscriptions

A subscription is defined as a "contract by which one engages to contribute a sum of money for a designated purpose gratuitously, as in the case of subscribing to a charity" (83 C.J.S. Subscriptions 1, p. 731 (1953)).

Most colleges and universities have special campaigns, annual or capital, in which they solicit pledges or subscriptions. Subscriptions or subscription contracts have a special legal status. Such pledges are considered contractual or quasi-contractual in nature and are often enforceable.

There are four requisites that the courts have established for a valid subscription. It must be executed (signed). It must be delivered. (Delivery can be either actual or constructive.) It must be supported by consideration, and

it must be accepted. Issues may arise with regard to any of these elements.

Subscriptions need not be in writing but may be oral. Note, however, that statute of frauds requirements may be relevant to the transaction depending on the amount of the subscription or other factors stipulated in the particular state. In any case, when an institution tries to enforce a subscription, it must produce evidence that there has been an executed transaction.

No particular form need be followed for a subscription but the donor's intention to be obligated must be definitely shown. In American University v. Todd (1 A. 2d 595 (Del. 1938)), the court held that a promise to pay "at my convenience" was enforceable because the subscriber was in effect agreeing to pay when he was able.

Some factors generally bearing on the definiteness required are a date, a dollar amount, and a designated payee. In some instances courts have not required a date, but at a minimum they have required a stated dollar amount. And while the payee should be stated on the subscription, it has been held sufficient that there be an acceptance by the party for whom the pledge was intended.

Of the four required elements, some of the most interesting cases have involved consideration. Consideration is generally defined as the inducement of a contract; it usually entails some value given in exchange for a promise (that is, for the pledge). In general, courts have considered a subscription to be unenforceable in the absence of consideration. However, four theories have been used to establish the existence of consideration (or its equivalent) in suits to enforce a subscription: (1) promissory estoppel, (2) mutual promises of subscribers, (3) mutual promises of subscriber and beneficiary, and (4) public benefit.

Estoppel is a device applied in the absence of a genuine consideration. The promisor (the person who pledges) is estopped (prevented) from avoiding payment of the subscription because the institution (the promisee) has relied on the pledge to its detriment.

The courts have applied the doctrine of promissory estoppel when the institution has assumed a duty, done work, incurred liability, or expended money in reliance on the promise of the subscriber. The first reported state case where the doctrine was applied to an institution of higher education was University of Vermont v. Buell in 1829 (2 Vt. 48).

In Trustees of University of Pennsylvania v. Cox's Executors (277 Pa. 512, 121 A. 314 (1923)), the state supreme court

held that because the university had relied on a promise to pay a subscription to the treasurer to build a museum and had incurred expenses and obligations for that purpose, there was good consideration. The court held that the subscription was a valid and binding contract enforceable even against the estate of the subscriber.

In the same case, the second theory--mutual promises of subscribers--was suggested by the court as additional authority for enforcing the subscription. The court cited an earlier Pennsylvania case, Converse's Estate (240 Pa. 458, 461, 87 A. 849, 850 (1913)). In the Converse case, because other subscriptions had been secured on the strength of the defendant's promise, the court enforced a pledge towards the endowment funds of Park College.

Not all jurisdictions have accepted the second theory. Some courts have held that mutual promises of subscribers do not constitute a consideration between the subscriber and the beneficiary because the latter has promised nothing.

The third theory is based on the idea that consideration is created by the mutual promises, either expressed or implied, of the subscriber and the beneficiary. In Allegheny College v. National Chautauqua County Bank (246 N.Y. 369, 159 N.E. 173 (1927)) and in similar cases, the courts have held that by accepting the subscription, the institution promises to carry out the purpose for which the subscription was presented. This theory has also been called the mutual benefit theory.

The fourth theory, which can be derived from the third, is that consideration is based on the existence of a public benefit. When the organization provides a benefit to the public as a whole, it provides it to the promisor as well. It is this benefit to the promisor that is the basis for declaring that consideration is provided by the institution.

In spite of the variety of theories under which an institution may seek to enforce a subscription, there are times where consideration has been deemed to fail. For instance, in the Nebraska case of Cotner College v. Estate of Hester (155 Neb. 279, 51 N.W. 2d 612 (1952)), a subscription note had been executed for the benefit of the college, which had been conducting a program of Christian education. Eventually, the college was closed, the faculty discharged, and the program abandoned. When the college re-established itself elsewhere in smaller quarters and with a different program, the court determined that there had been a failure of consideration relieving the maker of a subscription note from further obligation. But compare this to the case of Central University of Kentucky v. Walter's Executors (122 Ky. 65, 90 S.W. 1066 (1906)) where the consolidation of the school with another and

the movement to another location did not relieve the subscriber of the duty to fulfill the pledge.

Another case where consideration failed was examined by the Pennsylvania Supreme Court in Carson Estate (349 Pa. 529, 37 A. 2d 488 (1944)). When a private school had solicited subscriptions for the construction of a new building, the defendant subscriber had promised to pay a fixed amount when construction was begun. Promotional literature described the proposed "memorial building" as a three-story brick structure. The court ruled that consideration in this case had failed and the promise to pay was unenforceable because the school had not built the new brick structure but instead had repaired a preexisting wooden structure and had renamed it the "memorial building." The court held that the subscription contract was only executory, that is, it presumed a specific performance by the school before payment would be required.

Consideration has also been judged to fail where one of the parties has made a false subscription to induce the pledges of others. In contract law, fraud nullifies the basis for the mutual assent of the parties and, therefore, nullifies the basis of the consideration. False representation in such circumstances renders any subscriptions void.

As with other types of gifts, conditions may be attached to a subscription. If such provisions are clearly expressed, the courts will enforce them.

In a case that dealt with acceptance of the subscription, the court held unenforceable a promissory note by a donor to pay an amount to a theological seminary for a library fund. The court found that there was no acceptance because the professor who had received the note had not notified the trustees until after the death of the donor.

Problems with charitable trusts

A variety of specific issues and problems may develop in connection with charitable trusts to institutions of education. The first of these is determining whether a gift is absolute or in trust. Courts will look to the intention of the donor, which will be controlling in the resolution of the matter. This must be ascertained by examining the instrument in the context of the circumstances under which it was drawn.

In the Nebraska case of Hobbs v. Board of Education of Northern Baptist Convention (126 Neb. 416, 253 N.W. 627 (1934)), the state supreme court faced the question of whether monies in

the Grand Island College endowment fund constituted a charitable trust, or whether full ownership of the fund rested in the college and it was therefore subject to claims of the college's creditors. The court considered the instrument creating the endowment to determine the intention of the grantor, the American Baptist Education Society, and to determine whether the fund should be subject to the "exigencies or peril of mismanagement" by the institution or only to control of the trustees. The court held that in this case the intention was to create a trust fund that would remain inviolate and that "subsequent contributions to the fund were made with special reference to the original donations of the education society" (253 N.W. at 631).

In the Hobbs case, the court determined that the donative instrument was a charitable trust rather than an absolute gift. In Nugent v. Saint Dunstan's College of Sacred Music (324 A. 2d 654, 656 (R.I. 1974)), the Rhode Island Supreme Court, citing Hobbs as authority, found that donors to a 1952 fund drive intended to make absolute gifts to the college for its general purposes. The court's finding of specific intent to benefit the college only and no other institution served to defeat an attempt to apply cy pres for the benefit of another institution. If a charitable trust had been intended, then the court could have applied the cy pres doctrine. However, the court commented that even if the fund were a charitable trust, there was sufficient specificity to preclude a finding of general charitable intent, a prerequisite for the application of cy pres.

Another dimension to this issue is that technically a trust involves the separation of legal and equitable title to the corpus (or principal) of the trust. There are situations, however, where the institution of higher education has been named as trustee and beneficiary of a trust. This creates an interesting legal issue. If maximum discretion is vested in the trustees, does a trust in fact exist? Some courts have classified the arrangement as an absolute gift based on the interpretation that where legal and equitable title merge, there is no trust.

Normally, when a gift is made in trust, the college or university holds the property as a trustee, not as its own; and, therefore, the institution must carry out the instructions of the trust's creator. This distinction is important for another reason; if there is no trust in fact, it is a gift, and the institution may do what it wishes with the property. On the other hand, money in a trust is protected from the institution's creditors.

Another issue of importance is whether the terms of the trust are sufficiently certain. Generally, a charitable trust must be

definite as to its terms. However, courts are reluctant to declare charitable trusts void for uncertainty and will supply a reasonable interpretation of terms that are uncertain.

For instance, in cases involving a question about the amount of a trust (or gift), courts have not held it void when the amount is readily calculated. In Field v. Drew Theological Seminary (41 F. 371, 374 (C. C. Del. 1890)), the court held that a "sum of money sufficient to carry out the intention" of providing Christian education for two young men could be determined because "the expense of keeping them in the seminary for the allotted time is approximately known; and it is a matter of easy calculation" (p. 375).

The subject matter or purpose of the charitable trust may be challenged. A second issue in Field was the validity of the scholarship trust, that is, whether it was legitimately for a charitable purpose. The plaintiffs argued that the benefits of the fund went to the students rather than to the institution and that the purpose of the trust (providing for the education of young men for the ministry) was not a valid public purpose. The court did not agree; it ruled that the trust was valid and that it was not necessary to show that any benefits came to the institution. This reasoning again illustrates how broadly courts have construed charitable purposes in cases involving education.

Trusts established for the purpose of loaning funds to students have likewise been upheld. These loan funds have been sustained even though they benefit only a limited number of persons and even when they have contained onerous provisions such as requiring that students work in their spare time and during vacations or that they not keep a car or marry during college.

Other issues may emerge with respect to conditions in charitable trusts. Trust instruments usually contain some guidelines on the administration of the trust. Restrictions or conditions must be followed by those who administer the trust.

For example, a testamentary trust (one created by a will) may have a condition subsequent stating that if a certain event occurs, the trust will fail and the corpus or principal of the trust will revert to the settlor or to his or her estate or heirs. In a Pennsylvania case, Patterson's Estate (333 Pa. 92, 3 A. 2d 320 (1939)), a trust fund established for Ursinus College included the provision that in the event that the college failed to teach Evangelical Reformed Church principles, the trust was to revert to the estate and be equally divided among the settlor's heirs. The heirs brought an action to have the court declare that this condition had

in fact occurred. On appeal the state supreme court held that the heirs had failed to sustain the burden of proof and that there had been no proof of a change in attitude by the college towards Evangelical Reformed principles. Furthermore, the college still employed a chaplain and held daily chapel services.

In addition to the statutory and common law principles discussed above, some states have enacted laws that direct some form of state supervision of charitable trusts.

Luis Kutner (1970) observes:

[B]ecause charitable trusts are by definition intended to benefit the general public, however indirectly, they should be subject to some form of public supervision.... The need for legislation specifically designed to protect and enforce charitable trusts has long been recognized by both commentators and the Commission of Uniform State Law which drafted the Uniform Supervision of Trustees for Charitable Purposes Act in 1954.... [However, because this act has proved unacceptable, most states have instead] a wide variety of legislation relating to charitable trusts and foundations. (pp. 349-50)

Kutner goes on to say:

Some states have recently [late 1960s] adopted rather effective Charitable Trust Acts, while others have...nothing more than a collection of isolated statutes, administrative regulations, and dated court decisions...[or] have provided virtually no state control over the administration of charitable trusts. (p. 350)

As of 1983 only four states--California, Illinois, Michigan, and Oregon--had adopted the Uniform Supervision of Trustees for Charitable Purposes Act since it was proposed in 1954.

In those states that have them, charitable trust supervision acts typically provide for some form of the following types of regulation:

1. that a charitable trust be registered with the state, perhaps with a designated state bureau, within a particular period of time from its creation;
2. that charitable trustees make regular financial reports to a designated state agency;

3. that charitable trusts are subject to particular enforcement procedures and sanctions.

Revision of charitable trusts: Cy pres and related doctrines

Sometimes events make the administration of trusts impossible or impracticable. What can the institution do under those circumstances? It may seek a judicial revision of the charitable trust. The Restatement of the Law of Trusts (Second) defines the application of the cy pres doctrine, as one such means of revision, as follows:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.
(Section 399)

This definition presents the major elements that must be considered in the application of the cy pres doctrine. Under the common law, a court will ask several basic questions when it decides whether it should apply the doctrine:

1. Is the instrument a valid charitable trust?
2. Do the terms make it impossible or impractical to carry out the specific purpose of the trust?
3. Does the trust exhibit a general charitable intent?

The same common law elements may have been codified through state statutory enactment. In such a case, a court will ask the same questions. However, in some states the statutes vary from the common law doctrine. For instance, Pennsylvania's current cy pres statute, as revised in 1972, reads in part:

Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impractical of fulfillment,...the court may,... order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether his charitable intention be general or specific. (20 PA. CONS. STAT. ANN. 6110 (Purdon))

Notice that this statute, unlike the common law doctrine of cy pres (as defined above), has an additional permissive element. It does not require the existence of a general charitable intent. Some state statutes do not mention the general intent element at all.

If no statute exists, case law governs what elements must be shown. According to one authority, as of 1980, 32 jurisdictions had affirmed and applied the cy pres doctrine. (Fisch et al., 1974, p. 421 (updated by 1980 pocket part.)) The states are Alabama, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

If the court is bound to find all of the traditional conditions for applying the doctrine, it will first examine the trust document to determine the settlor's dominant purpose. This purpose must be ascertained primarily from the document itself, but it may also be discovered through extrinsic evidence.

Second, once the dominant purpose of the settlor has been established, the court must determine whether carrying out the settlor's specific intent is impossible or impractical. Again, this is a matter of circumstances, as judged by legal standards.

Third, if the court finds the second prerequisite has been met, then it must establish whether the dominant purpose of the settlor exhibits a general charitable intent that will permit a specific alternative application. Luis Kutner (1970) makes the following observation about establishing general intent:

The modern tendency has been to decide each case on its own facts without observing any rules of thumb regarding intent. The reason for the intent requirement is that the court is theoretically enforcing the actual and expressed intent of the settlor and the selection of a secondary charitable objective is not because the court thinks such a result desirable, but rather because the donor actually desired it. But it is evident that this intent requirement is largely fictional. (p.39)

This may explain why some states, such as Pennsylvania, have eliminated the general intent element from the cy pres statute.

The application of the cy pres doctrine to 20th century cases has raised further issues. In general, while cy pres appears to be a predominantly permissive aspect of the law of trust, it does contain a restrictive dimension. The cy pres doctrine is not a carte blanche that will permit the alteration of any charitable scheme. Limitations to its application are found in the opinions in many of the cases.

The typical petition for application of the cy pres doctrine is made when the institution or the charitable trustees feel that a change of circumstances makes it impossible or impracticable to carry out the provisions of the testamentary charitable trust. A court must determine whether this is so. Mere inconvenience in the administration of the trust does not constitute impossibility or impracticability.

The Pennsylvania Supreme Court decided in McKee Estate (378 Pa. 607, 108 A. 2d 214 (1954)) that where the testator had directed the establishment of an interracial naval college, and where insufficient funding had made the immediate establishment of the college impossible, and where no other institution appeared to claim the fund, scholarships could be awarded to white and black orphan boys seeking a similar education. (A surplus of funds, as well as a deficiency, in any particular case could require a revision via cy pres.)

Three years after McKee, in one of the many Girard's will lawsuits, the same court refused to permit the application of the doctrine to alter Girard College admissions requirements because impossibility of performance had not been shown. The City of Philadelphia and two black applicants for admission to Girard College had sought to have the word "white" omitted from the trust instrument established by Girard's will. However, the supreme court of the state did not agree that compliance with the terms was impossible. It felt that there was no shortage of poor white male orphans and that the literal terms of the trust could be carried out just as they had been for a hundred years.

Similarly, in Connecticut College v. United States (276 F. 2d 491 (4th Cir. 1960)), it was held that where the testatrix had bequeathed \$300,000 in trust to the United States to build a dormitory, the plan had not become impossible or impracticable and cy pres could not be applied to use the money to add a wing to a building instead of building a separate structure. The United States had claimed the amount was insufficient to build a separate building. But after examining the instrument, the court concluded that the testatrix had clearly intended that the United States supplement the amount of the gift if it was not enough.

In many instances courts have permitted the application of cy pres when there has been an ineffective designation of a donee or where the designated donee is nonexistent. Because colleges and universities occasionally do go out of business, it is possible that a particular donee will no longer exist. The Medical School of Maine, for example, which had been under the control of Bowdoin College, was discontinued. Because Bowdoin continued to maintain a premedical program, it sought an alteration of a bequest to the medical school under the cy pres doctrine. (Snow v. President and Trustees of Bowdoin College, 133 Me. 195, 175 A. 268 (1934).) The court examined the donative instrument to determine whether the donor had intended to benefit the medical school itself or the purpose for which the school existed. The Supreme Judicial Court of Maine held that it was clear from the will that the testatrix intended the latter. Accordingly, it ordered that cy pres was to apply and the donor's charitable purpose be carried out by Bowdoin College through its premedical program.

Some courts, however, have held to the contrary and have permitted a reversion of the trust corpus (principal) to the settlor's estate. For example, in Simmons v. Parsons College (256 N.W. 2d 225 (Iowa 1977)), it was held that a trust established for students of the college had failed due to the college's bankruptcy and that testator's heirs at law were entitled to take the trust property that would otherwise have gone to the college as trustee. Also in Matter of Estate of Coleman (584 P. 2d 1255 (Kan. 1978)), evidence supported a determination that a Presbyterian college that attempted, under cy pres, to be substituted for the original beneficiary (a college that had closed) had failed to establish testator's general charitable intent.

In certain circumstances where an institution is unable to take a gift because of certain restrictions in the gift, the institution may ask the court to invoke cy pres to permit an alteration so that it can accept the gift. In Howard Savings Institution v. Peep (61 N.J. Super. 119, 160 A. 2d 177 (1960); aff'd 34 N.J. 494, 170 A. 2d 39 (1961)), a testamentary scholarship trust had been established by an alumnus of Amherst College. The trust was to provide "a scholarship loan fund for deserving American born, Protestant, Gentile boys of good moral repute, not given to gambling, smoking, drinking or similar acts." The Amherst College charter, however, provided that "no student shall be refused admission to, or denied any of the privileges, honors, or degrees of said college, on account of the religious opinions he may entertain." Amherst refused to accept the funds because it would have had to violate its charter to administer them. A New Jersey chancery court applied cy pres and ordered that the words "Protestant" and "Gentile" be removed from the will provision and the funds turned over to the college. The state supreme court affirmed this decision.

One of the most frequent reasons for seeking a revision of a charitable trust through the doctrine of cy pres is a change of circumstances unanticipated by the donor. This factor was cited as an important policy consideration in Trustees of Dartmouth College v. City of Quincy (258 N.E. 2d 745 (Mass. 1970)), where the court stated:

A donor who brings into existence a charitable institution must recognize that most institutions are likely to change with time, that they will become sterile if they remain static, and that they must be adaptable to new public considerations and unpredictable economic circumstances. (p. 753)

The language of a charitable trust, establishing a school for women who had been born in the town of Quincy, was interpreted as referring only to the use of the testator's gift and did not preclude the use of the facilities by women who paid full tuition and had not been born in Quincy.

As these cases illustrate, the cy pres doctrine has been frequently invoked to benefit institutions of higher education. However, in considering requests to apply cy pres, courts have always had to weigh the interest of the institution against the rights of the testators, settlers, and heirs at law. While the doctrine has been liberally applied, some limitations have emerged.

In Lehigh University v. Hower (46 A. 2d 516, 521 (Pa. 1946)), Judge Thomas Baldrige of the Pennsylvania Superior Court underscored the limitation dimension.

A court may vary specific instructions given by a testator in his will in order to accomplish the ultimate end which he had in view, provided such departure does not impair the interest of any beneficiary or violate the testator's primary purpose.

Another limitation exists in the extent to which appellate courts may substitute their judgment with regard to lower court cy pres determinations. As to the nature of higher court reviews of the application of cy pres, Justice John Bell of the Pennsylvania Supreme Court stated:

[T]he test is not what we would have decided if we had been sitting as a trial court--the test is whether the lower court has mistaken or misapplied the law or committed a manifest abuse of discretion. (In re Estate of Glase, 384 Pa. 118, 120, 119 A. 2d 294, 295 (1956))

Another similar but distinct doctrine that has been applied to charitable trusts is the doctrine of approximation, that is, a rule of judicial construction (interpretation) of the trust as it would have been intended by the grantor in the light of changed conditions. Some courts have equated the two doctrines. The doctrine of approximation, however, seems more flexible because it does not require that there be impracticality or impossibility of performance. The focus of this doctrine is mainly on the existence of "changed conditions."

A third doctrine is the doctrine of deviation. A 20th century description of this doctrine can be found in the Restatement of the Law of Trusts (Second):

The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purpose of the trust. (Section 381)

One authority explains the distinction between cy pres and deviation as follows:

[A]nalogous to, but not as extensive as the cy pres doctrine which permits a change in charitable purpose, the doctrine of deviation allows a court to authorize departures from the administrative provision of a charitable disposition.... Unlike the cy pres doctrine, deviation can be invoked absent a general charitable intent. (Fisch et al., p. 547)

The doctrine of deviation does not permit a change in charitable purpose. It is designed mainly to facilitate the administration of the trust.

Gifts in anticipation of death: Mortmain statutes

Chapter 1 examined the history of legislation aimed at limiting deathbed bequests to charity. During the 19th century, various states adopted mortmain statutes, declaring that bequests or devises to charity in a person's will made within a certain amount of time (usually 30 days) before his or her death were void. This was meant to protect heirs from a dying person's improvident act of charity made out of concern, for instance, for his or her spiritual future.

This 19th century sentiment limiting the privilege of deathbed dispositions to charity was reversed in the 20th century as many states either legislatively repealed the mortmain statutes or judicially sustained constitutional challenges to their validity. The judicial challenges to mortmain have been based on either constitutional equal protection or due process grounds.

An equal protection attack occurred in the Pennsylvania case of In re Estate of Cavill (329 A. 2d 503 (Pa. 1974)). The state supreme court held that the state statute, which invalidated bequests to religious or charitable organizations made within 30 days of the testator's death, denied charitable donors and beneficiaries the equal protection of the law. The court based its holding on the rationale that the Fourteenth Amendment of the Constitution does not give states the power to legislate different treatment to people placed by the statute in different classes on the basis of criteria unrelated to the statutory purpose.

According to one authority (Fisch et al., 1974, p. 81 and 1980 pocket part, p. 12), by 1980 only seven states still had mortmain statutes. A number of these jurisdictions have sustained the statutes against attacks on their constitutionality. One court, in protecting the statute, said:

The right to receive or dispose of property by last will and testament is not an inherent right, nor is it one that is guaranteed by the fundamental law. Nowhere in the Federal Constitution is there any attempt to treat the matter of disposition of property by will.... [T]he right of the testamentary disposition of property does not emanate from the organic law...but is...derived solely from statute without constitutional limitation. (Taylor v. Payne, 17 So. 2d 615, 617 (Fla. 1944))

In a law review article, Tabakin suggests that statutes like those of New York and Iowa "are sufficiently narrow and reasonably related to their purpose to meet the equal protection standard, and could provide models for those jurisdictions that wish to preserve charitable restrictions" (Tabakin, 1975, p. 171).

Delayed or indefinite vesting of title to property: The rule against perpetuities

In certain circumstances, a charitable gift or trust does not vest (pass to the institution) immediately. The time for its passing is indefinite, delayed, or remote. This may create a perpetuities problem.

For example, let us say a woman establishes a trust arrangement whereby her alma mater receives the deed to her country estate when and if her daughter, then 20 years old, dies childless. The gift or interest is established, but the university's interest will not definitely vest until the daughter dies childless and in fact may never vest at all. The school's interest is contingent on the daughter's death without issue but it may also be void because it violates the rule against perpetuities. Under the rule, the possibility that the future interest of the school may not vest within the stipulated period of 21 years renders it invalid.

The rule against perpetuities is a technical rule of law designed to limit the period during which the vesting of title of a future interest may be postponed to lives in being (at the time the gift was made) plus 21 years--that is, to 21 years after the death of some specific person or persons. The purpose of the rule is to prevent the removal of property from commerce for a long or indeterminate period of time.

The common law rule against perpetuities is in effect in most states except where it has been modified by statute. The application of the rule to charities and the nonprofit sector is described by Robert Lynn:

Although it is occasionally stated that charitable trusts and foundations are exempted from the operation of the Rule Against Perpetuities, that statement is both erroneous and misleading. It is erroneous because a contingent future gift for charity must be so created that it will vest, if it vests at all, within the perpetuities period (save that a gift over from one charity to another charity on a contingency that may be resolved remotely is good under the Rule). The statement is misleading because it implies that the Rule Against Perpetuities is a Rule against the duration of trusts, whereas the Rule in modern form is a rule against remoteness of vesting. Nonetheless, it is probably true that the judiciary has created an "exemption" for charitable gifts in the sense that the blackletter perpetuities law is not applied as harshly in the context of the charitable gift as it is in the context of the family gift, but in that connection it is only candid to admit that the trend of the law generally has been to relax the requirements of the Rule irrespective of context. (Lynn, 1966, p. 1099)

In other words, the judiciary has taken a generally permissive attitude in applying the rule to the nonprofit sector in modern times.

One method of avoiding the problem of remote vesting has been employed repeatedly by courts from the late 19th century to the present, and that is the application of cy pres. It has been applied when a condition precedent, e.g. the existence of a charitable donee, for the vesting of an interest is absent. Under such circumstances the gift has been construed under cy pres as being a gift to "charity in the abstract," which is unconditional and not subject to the rule. In such cases, where a donor has made a gift to establish a charitable organization at some time in the future in a period beyond the rule, courts under cy pres have directed the sum towards an existent substantially similar charitable purpose. (See, for example, Codman v. Brigham, 72 N.E. 1008 (Mass. 1905)) and Franklin v. Hastings, 97 N.E. 265 (Ill. 1911).)

Kutner (1970) comments on the use of cy pres to obviate the rule against perpetuities:

The application of the doctrine of cy pres to avoid the Rule Against Perpetuities has been criticized as use of "distorted reasoning" in attributing "indiscriminate philanthropy" to the donor and that "it would be more in accord with reason and consistency simply to hold the rule against remoteness inapplicable to charitable trusts" as justified by public policy. However, it has been noted that generally speaking cy pres may be invoked only when a valid gift fails. If a gift contravenes the Rule Against Perpetuities it is totally void so that there is nothing on which the cy pres doctrine may operate. But there are exceptions to this presupposition of a valid gift. (p. 97)

A related perpetuity problem is that of indefinite accumulation of trust income. What is the disposition of such trusts if attacked by a school or heir? In some states legislatures have responded to the problem by establishing statutory guidelines for trust income accumulations. Otherwise, it is usually left to the court to determine whether a particular accumulation is reasonable or not.

A court will have to determine whether the provisions are valid and in the public's best interest or are void as against public policy. Once again, the court will engage in a process of balancing--weighing the benefit of allowing adequate sums to accumulate in order to carry out the donor's wishes against the benefit of allowing funds that have been directed to education to be used for education. Depending on the statutory or judicial parameters, a court can, under its equity powers, either sustain, terminate, eliminate, or modify a trust accumulation.

To determine the length of time over which funds should accumulate, a test or rule of reasonableness is evident in the case law. In Massachusetts, for example, the state's highest court upheld an accumulation that was to continue until the income was sufficient for the trust purpose, or until at least 25 years after the death of the donor (Trustees of Dartmouth College v. City of Quincy, 331 Mass. 219, 118 N.E. 2d 89 (1954)). In another case 10 years later, Pennsylvania's Supreme Court decided that 400 years was too long for income accumulation (In re James' Estate, 414 Pa. 80, 199 A. 2d 275 (1964)). More recently the same court invalidated a trust provision that directed that income be accumulated for 500 to 1,000 years with only a small fraction going to the beneficiary (Trusts of Holdeen, 403 A. 2d 978 (Pa. 1979)).

TAX POLICY AND THE DONOR

People give to education for many reasons. But whatever the motive, public policy has established additional economic incentives, mainly tax advantages. These special tax treatments have had both permissive and restrictive effects. Examples of both appear in the following overview of the history and current status of the tax law as it applies to giving to institutions of education. Because of the highly technical and constantly changing nature of the tax law, a reader with a particular problem or question should consult the regular technically-oriented tax guides and tax services as well as legal counsel. This material is designed primarily to outline for the lay person the fundamentals of tax law as it relates to educational fund raising.

Federal tax treatment

The first federal income tax law was passed by Congress in 1862, but taxes were never actually collected and the law was repealed after the Civil War. Attempts to reintroduce the income tax during the 1870s were unsuccessful but in 1894 a bill was passed that provided for the taxation of income over \$4,000 at the rate of 2 percent. This provision failed to pass judicial scrutiny, however, and was struck down in Pollack v. Farmers' Loan and Trust Co. (1895). The United States Supreme Court held in Pollack that the income tax was a "direct tax" and therefore in violation of the Constitution, Article 1, Section 2, which required that direct taxes be apportioned among the states by population.

To rectify the constitutional objection, Congress and the states ratified the Sixteenth Amendment in 1913. That amendment states:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

In that same year Congress enacted another income tax law, providing for taxation of individual income at a graduated rate--1 percent up to \$20,000, and so on. At first the act did not provide any charitable deduction, but in 1917 it was amended to permit an individual to deduct up to 15 percent of his or her taxable net income for charitable gifts.

The current charitable deduction section in part provides the following:

- (a) Allowance of deduction.--
 - (1) General rule.--There shall be allowed as a deduction any charitable contribution... payment of which is made within the taxable year....
- (b) Percentage limitations.--
 - (1) Individuals.--
 - (A) General rule.--Any charitable contribution to--...
 - (ii) an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on,... shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year. (I.R.C. section 170)

In addition to the statutory parameter for the determination of charitable deductions, the IRS has a comprehensive set of regulations (26 C.F.R. 1.170) that explains and interprets the Code. For example, the regulations define charitable institutions for which gifts may be deducted to include educational organizations, "institutions such as primary, secondary, preparatory, or high school, and colleges and universities" (26 C.F.R. 1.170-9). Further application, interpretation, and clarification of the charitable deduction provisions are obtained through judicial and quasi-judicial determinations made through revenue rulings.

The charitable deduction is permitted for gifts of long-term capital property as well as for gifts of income. This includes stocks, bonds, real estate, and other property

held for 12 months or more. The percent limitation on this type of gift is somewhat more restricted. The limitation on donations of most appreciated long-term capital gain property is 30 percent rather than 50 percent.

It should be noted that these limitations are on the total charitable deduction amount that may be made by the donor in any tax year. This is roughly equivalent to the percent of adjusted gross income, either 30 percent or 50 percent. Carryover provisions will permit a donor to deduct the amount exceeding the limitation in subsequent tax years.

On the issue of determining the amount of a deduction, cash gifts pose no problem. Non-cash gifts on the other hand involve special rules. (See IRS Publication 526 (1983) on charitable contributions.)

In general, a donor may deduct the fair market value of gifts of property. If the property has appreciated, i.e. increased in value, some adjustments may have to be made. For instance where the sale of property results in ordinary income or short-term capital gain, such as in the sale of inventory or of stocks held for less than a year, the deduction is limited to the fair market value less the amount that would be ordinary income. Or where the donor has chosen the option of a 50 percent limit on the sale of long-term capital gain property, the fair market value must be reduced by 40 percent of the appreciation. This latter rule also applies when the property donated to the charity is put to an unrelated use.

David Donaldson (1983) points out some tax-related complications for donors of real estate to institutions of higher education:

1. The sale price of the property by the institution determines the amount of the donor's charitable deduction unless the property is held by the institution for some time;
2. The donor should avoid negotiations with potential buyers of the property before making the gift because the IRS may determine the sale to be a fait accompli and thus taxable to the donor;
3. The amount of the donor's charitable deduction will be affected by rules regarding the recapture of depreciation; that is, depreciable property is considered ordinary income property to the extent of any gain that would have been treated as ordinary income (because of depreciation) had the property been sold;

4. Bargain sale rules will apply if donated property is subject to indebtedness; that is, a bargain sale is a sale or exchange of property to a charity at less than its fair market value and where the transaction is considered part sale or exchange and part contribution; in such an instance, the amount of any indebtedness, such as a mortgage, is treated as an amount realized for purposes of the bargain sale division even though the organization does not agree to pay or assume the indebtedness;
5. Gifts of partial or remainder interests in property are normally not deductible (unless the property is a personal residence or farm, and then only if the institution receives the entire remainder interest); this is because in general no deduction is allowed for a charitable contribution, not made by a transfer in trust, of less than the entire interest unless that interest is the donor's entire interest in the property, such as an income interest or a remainder interest. (pp. 195-199; IRS publication 526, 1983, pp. 3-5)

Because of the variety of potential tax problems, every donor should be encouraged to consult legal or tax counsel before making a donation. Some additional examples illustrate various problems.

A donor will not always be able to claim a charitable deduction. For instance, no claim is allowed if the institution is not recognized as educational or if its tax-exempt status has been revoked. (See Chapter 3.) A charitable deduction may also be disallowed on other technical grounds. For instance, the deduction may not be allowed if it is not clear that the benefit of the gift will be directed to the educational institution.

In Phinney v. Dougherty (307 F. 2d 357 (5th Cir. 1962)), a gift to a University of Texas fraternity fund to benefit its members was not a permissible deduction because the fraternity was not organized and operated exclusively for educational purposes. Some clarification of this issue was provided by a revenue ruling issued several years later. The ruling stipulated that payment of scholarship funds is a contribution to or for the use of colleges or universities and is deductible when it meets the requirement that the contribution be to or for the use of the institution rather than for a particular individual and when the institution has full control of the use of the donated funds.

By contrast to the Phinney case, the IRS in another situation decided to permit a deduction for a gift for the construction of a fraternity house at a college. The title to the house was to be held by the college and thus the gift was clearly made to the college and not to the fraternity.

An important development in the tax law was the passage of the Economic Recovery Tax Act of 1981. Until 1982 only taxpayers who itemized deductions could take advantage of the charitable deduction. Those who took the standard deduction (now the "zero bracket" deduction) were excluded. The 1981 act contained the nonitemizer charitable deduction, which serves as an additional incentive for charitable giving to education. Efforts to secure passage of the nonitemizer charitable deduction took over five years, and the following amendment to I.R.C. 170 was the result:

(i) Rule for nonitemization of deductions.--

(1) In general.--In the case of an individual who does not itemize his deductions for the taxable year, the applicable percentage of the amount allowable under subsection (a) for the taxable year shall be taken into account as a direct charitable deduction under section 63.

(2) Applicable percentage.--For purposes of paragraph (1), the applicable percentage shall be determined under the following table:

For taxable years beginning in--	The applicable percentage is--
1982, 1983, or 1984.....	25
1985.....	50
1986 or thereafter.....	100

(3) Limitation for taxable years beginning before 1985.--In the case of a taxable year beginning before 1985, the portion of the amount allowable under subsection (a) to which the applicable percentage shall be applied--

(A) shall not exceed \$100 for taxable years beginning in 1982 or 1983, and

(B) shall not exceed \$300 for taxable years beginning in 1984.

In the case of a married individual filing a separate return, the limit under subparagraph (A) shall be \$50, and the limit under subparagraph (B) shall be \$150.

(4) Termination.--The provisions of this subsection shall not apply to contributions made after December 31, 1986.

Note that a full deduction will not be phased in until 1986. Initially, two limits have been placed on the amount a nonitemizing taxpayer may deduct for a charitable contribution: first, there is a maximum dollar amount to which the deduction applies, and, secondly, only a percentage of that amount can be deducted. The chart below shows the effects of these limits; note that the provision expires in 1987:

<u>YEAR</u>	<u>PERCENTAGE</u>	<u>CAP</u>	<u>MAX. DEDUCTION</u>
1982	25	\$100	\$ 25
1983	25	\$100	\$ 25
1984	25	\$300	\$ 75
1985	50	\$300	\$150
1986	100	\$300	\$300
1987	Provision Expires		

Pertinent cross-references to other code provisions include:

- (1) For charitable contributions of estates and trusts, see section 642(c).
- (2) For nondeductibility of contributions by common trust funds, see section 584.
- (3) For charitable contributions of partners, see section 702.
- (4) For charitable contributions of nonresident aliens, see section 873.
- (5) For treatment of gifts for benefit of or use in connection with the Naval Academy as gifts to or for use of the United States, see section 6973 of title 10, United States Code (I.R.C. 170(K)).

In addition to the charitable income tax deduction, the tax law allows charitable deductions for estate and gift tax purposes. The first federal estate tax was passed in 1916; in 1918 the charitable gift exemption was incorporated into the law. In 1926 the estate law was reorganized to form what is the essence of today's estate tax law. The deduction for charitable bequests enacted in 1918 has remained relatively intact since then.

In 1924 Congress enacted the first gift tax. It taxed inter vivos or lifetime gifts. Like the estate tax, the gift tax has remained relatively unchanged since its inception. Since 1976 the estate and gift tax provisions and rate structures

have been linked through a unified tax rate schedule that equalizes the tax liability on the total amount of gifts given during life and at death. Intervivos gifts made before the 1976 Tax Reform Act were taxed at a lower rate than gifts by will.

The Internal Revenue Code allows a total deduction from the gross value of the estate for the amounts of bequests, legacies, devises, or transfers made "to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes...." Similarly, intervivos gifts to the kinds of organizations listed above are exempted from the gift tax.

It should be noted that conditional gifts, either intervivos or testamentary, may not qualify for a deduction. For example, a donor may wish to preserve certain property interests for his or her family in conjunction with a charitable gift. Such a gift may be construed as conditional but whether it qualifies for an exemption depends on the specific terms of the gift.

The major case on this issue came before the Supreme Court in 1955 in Commissioner of Internal Revenue v. Estate of Sternberger (348 U.S. 187 (1955)). The essential test as stated in that case is that if it is unlikely that the condition will occur and the institution receive the gift, the deduction will not be allowed. The Court held that the existing Code provisions and regulations permitted the IRS to allow estate tax deduction only where the enjoyment of a conditional gift to charity is assured, or when the possibility of the occurrence that will deprive the charity is so remote as to be negligible. This was not the case where the gift was to take effect only if decedent's childless 27-year old daughter died without descendants surviving her and her mother.

The life income gift is another giving method that is affected directly by federal tax policy. The idea of a life income (also called deferred) gift to an institution is not new. Several devices have emerged over the years in conjunction with estate or trust planning.

In a life income arrangement, as in a charitable remainder trust, the donor creates a trust that will pay income for life to the donor (and/or to the donor's spouse) and at the death of the lifetime beneficiary (or beneficiaries), the remainder (or corpus) of the trust passes to the institution. In such an arrangement the institution may or may not be appointed trustee. Many institutions that actively promote life income gift agreements with their constituencies are designated as trustees. In any case, important income,

estate, and gift tax implications are attached to life income gifts.

The Tax Reform Act of 1969 imposed major limitations on the types of life income gift arrangements that are eligible for a charitable deduction. The instrument creating the gift must follow prescribed restrictions as to the form and content.

The current section 170 of the Internal Revenue Code provides that no deduction will be allowed for the value of a remainder interest transferred in trust unless the trust qualifies as:

1. a charitable remainder annuity trust: the donor creates an irrevocable charitable remainder and receives a sum certain to be paid annually during his or her life;
2. a charitable remainder unitrust: an individual donor creates an irrevocable charitable remainder and receives a fixed percentage of the net fair market value of the assets annually during his or her life;
3. a pooled income fund: a group of donors creates irrevocable charitable remainders in which the transferred property is commingled and from which a life income interest is distributed according to each donor's proportional share of the total pool.

A fourth major type of life income arrangement is seen in the charitable gift annuity. This annuity is not a trust but a contract annuity. Part of the transfer to the institution constitutes a payment for an annuity; the other part is a charitable gift. Charitable gift annuities also qualify for special tax treatment under the Code.

Another device used mainly by donors in high gift and estate tax brackets is the charitable lead trust (also called a front-end trust.) A lead trust is the reverse of the charitable remainder trust. The educational institution receives the income from the principal of the trust during a period of years. The remainder interest, after the specified period, passes to a noncharitable beneficiary (usually the donor's family) or reverts to the donor.

The Tax Reform Act of 1969 eliminated the charitable income tax deduction that until then had been allowed for the gift of the income in a lead trust. However, because the trust may reduce the donor's income, it may still lower his or her income tax liability. (For a more detailed analysis of the technicalities of a lead trust, see Donaldson, 1983, pp. 184-199.)

Because these major types of life income gifts are subject to the technical requirements of the Code and because the use of them has financial and estate planning implications, many colleges and universities have added deferred giving specialists to their development staffs to assist donors and their attorneys. Institutions have also enlisted the help of attorneys with tax and estate planning expertise to provide guidance in their deferred giving programs.

State tax treatment

Most states have personal income tax laws with a graduated income tax, like the federal model, or a fixed percentage of adjusted gross income. Most states also permit taxpayers to take some form of charitable deduction. While a few states specify that a charitable deduction is permitted, many simply allow the taxpayer to take all or most of the deductions allowed in the federal income tax calculation.

This means that when a state allows an alternative zero bracket or standard deduction, the charitable deduction probably is not permitted. Both fund raisers and donors should keep this in mind and check the applicable state tax law.

State law on death taxes also varies. Pennsylvania, for instance, has a two-tiered inheritance tax structure that imposes a tax based on the classes of individuals (by degree of relationship) receiving devises or bequests from an estate. The transfer of property to or for the use of charities is totally exempt from the state inheritance tax. (This exemption parallels the total federal estate tax charitable deduction.)

THE CHARITABLE FOUNDATION: A VEHICLE FOR GIVING

The concept of the private foundation seems to have its roots in the 16th century. At that time charitable gifts could be made to a religious corporation known as frankalmoign, which could hold the property under common law tenure (Kutner, 1970, p. 51). The frankalmoign was a "spiritual tenure whereby religious corporations, aggregate or sole, held lands of the donor to them and their successors forever" (Black's Law Dictionary, rev. 4th ed., p. 787).

The modern charitable foundation has changed substantially from its 16th century predecessor. It has evolved into a variety of contemporary forms. The foundation of today is not susceptible to a single definition. Fisch et al. (1974) comment:

A charity that uses the word foundation as part of its name is a charitable trust, charitable corporation, or charitable association and apart from tax consequences the answers to legal issues pertaining to charitable foundations are found in the law governing charitable trusts, corporations, or associations. The word foundation does, however, have a meaning for tax purposes. (p. 35)

Another commentator defines the foundation as:

a nongovernmental, nonprofit organization having a principle [sic] fund of its own, managed by its own trustees or directors, and established to maintain or aid social, educational, charitable, religious or other activities serving the common welfare.
(Andrews, 1950, p. 3)

The specific nature and function of a foundation are defined in its charter. Because of this great diversity, the Internal Revenue Code does not directly define a foundation except in determining whether the organization is eligible for tax-exempt status as a foundation (Arthur Andersen & Co., 1979, p. 81). The Code sections 501(c)(3) and 509 state that a foundation is any organization exempt from income tax other than:

an organization to which contributions are deductible up to the 50 percent limit of the individual's contribution base, for instance, schools, hospitals, churches, or other publicly supported charities;

an organization receiving more than one-third of its support from its members and the general public;

an organization operated exclusively for the benefit of organizations described above;

an organization operated exclusively for testing for public safety.

There are several reasons for an individual to establish a foundation. A foundation provides a convenient method for handling the numerous requests the very wealthy receive. It does so by inserting a legal entity between the donor and the charity. It serves as a means by which the wealthy can retain partial control over the property given while enjoying some tax benefits (Fisch et al., 1974, pp. 41-42).

One classification of the types of foundations found in America includes the following:

(1) large endowed funds, which make grants for education, research, etc., such as the Ford and Rockefeller Foundations,... (2) smaller foundations which are primarily instruments for channeling the annual giving of their founders, during their lives, and of their families thereafter--sometimes called "family foundations";... (4) fund raising organizations which solicit public contributions and then make contributions to worthy causes, such as cancer, polio, and heart funds; (5) community trusts, which are organizations formed to give centralized administration to separate charitable funds--a pooling for investment and management purposes; (6) company foundations.... (Karot, as cited in Kutner, 1970, p. 3)

Because of the increase of abuses alleged in foundation practices, foundations are increasingly subject to regulation. The Tax Reform Act of 1969 instituted a number of major reforms designed to limit certain types of transactions by foundations such as self-dealing, failure to properly distribute income for exempt purposes, excessive holdings in unrelated businesses, investments that jeopardize tax-exempt purpose, and lobbying. Severe penalties can be imposed on private foundations for violation of these prohibitions.

There is considerable concern in some quarters that the restrictions imposed by this law may be having severe ramifications for endowed foundations. The high pay-out requirements, for instance, in inflationary times arguably have weakened the financial stability of a number of foundations. (See Charles Stewart Mott Foundation article, "Foundations: Scheduled for Extinction?" 1981.) Nevertheless, foundations will probably continue to provide a viable means for individuals to distribute their wealth to charitable causes. And educational institutions will continue to seek help from this source of philanthropy just as they have in the past.

Chapter 3

THE INSTITUTION AND THE LAW

Chapter 2 discussed the impact of the law of charity on the donor. That impact seems to be primarily permissive. The law broadly defines charitable educational purposes, supports the validity of gifts to education, and creates incentives for giving through the tax law.

This chapter analyzes the impact of the law of charity on nonprofit institutions. Here the attitude is primarily restrictive. Since the turn of the century there has been a noticeable increase in government regulation of the formation and maintenance of charitable and nonprofit organizations. Public policy has, accordingly, had a major influence on the ability of schools, colleges, and universities to attract gifts from individuals.

By this regulation, government has sought to prevent abuses of charitable status and to protect donors from abuses. Such regulations actually serve to promote a stronger nonprofit sector because donors will have more incentive to support worthwhile causes if they feel their donations will truly benefit the public good.

EDUCATIONAL CHARITABLE INSTITUTIONS

The law defines a charity primarily through governmental recognition. Governmental recognition of a charitable (or nonprofit) institution implies certain rights, privileges, and opportunities for that institution. This recognition is manifested in two ways: (1) granting of incorporation status by the state, and (2) according of tax-exempt status by the federal, state, and local governments.

Incorporation of charities: State recognition

Most states have statutes, such as a "Corporation Not-for-profit Code," that permit colleges, universities, and schools to incorporate. Incorporation enables an educational institution to acquire or hold personal or real property, to take or hold trust property, to invest trust funds, and so on. The specific powers that such an incorporated institution has depend, of course, on the specific provisions of the state in which it is incorporated.

There are limitations as to what types of organizations can incorporate. For instance, in Pennsylvania an organization

may not submit a corporate name containing the words "college," "university," or "seminary" unless it has first submitted proper certification from the State Board of Education (15 PA. CONS. STAT. ANN. section 7101 et seq.).

Incorporation statutes or charities codes may provide other regulations regarding the conduct of educational corporations. These regulations may relate to matters such as the right of an organization to accept gifts or bequests if its organizational purpose has been changed. Or they may limit the amount of property that may be held by a nonprofit corporation. Incorporated educational institutions are also bound by any other regulations designed to control fund-raising activities or fund usage. These will be discussed below.

Tax exemption: Federal recognition

Granting of tax-exempt status to an organization makes donations to it eligible for a charitable income tax deduction. The privilege of tax exemption has been characterized as a "double-edged sword" (Newman, 1955, p. 48). The federal government in its role of deciding which organizations can receive or retain exemption status effectively regulates nonprofit organizations. The government can control the conduct of such an organization in two ways. The strongest deterrent to mismanagement is the threat of removal of tax exemption status, which results in tax liability. In addition, if tax exemption is revoked, the taxpayer who has made donations cannot take a deduction for them. With no tax incentives for giving, taxpayers will stop contributing. And if taxpayers stop contributing, the organization will soon find it difficult to operate.

Let's consider four major elements of tax exemption: (1) the basis for granting exempt status; (2) the process of maintaining it; (3) the rationale for revoking it; and (4) the rationale for disallowing charitable deductions for gifts made to nonexempt organizations.

Section 501(c)(3) of the Internal Revenue Code permits the granting of exemption status to:

Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, . . . or educational purposes, . . . [under certain stipulations regarding net earnings, attempts to influence legislation, and political activities].

Internal Revenue Service regulations pursuant to section 501 define "educational" broadly and give the example of an

organization, such as a . . . college . . . which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.

To obtain tax-exempt status, the organization must submit an application (IRS Form 1023 (application for recognition of exemption)) which is in the form of a questionnaire and is designed to reveal the nature of the organization's activities, including its sources of funding. The organization must meet the criteria of section 501 and its regulations (26 C.F.R. 1.501) or it will not be considered "charitable" for the purposes of exemption.

In order to maintain exempt status, an organization must file annual information returns with the IRS (I.R.C. 6033 (returns by exempt organizations)). Educational organizations receiving gross receipts of less than \$5,000 are exempted; other colleges and universities must file IRS Form 990A. The institution must, among other things, report amounts of contributions received directly from the public, through professional fund raisers, as allotments from fund-raising organizations, as well as from other sources. The institution must provide specific information as to fund-raising events (type of activity, amount of receipts, expenses). The IRS will examine the information returns and decide whether to continue the exemption.

The ability of the federal government to regulate the non-profit sector is nowhere as clearly shown as through the exercise of its power to revoke tax-exempt status. Concurrently, the exercise of its power to deny charitable deductions is a potent secondary threat.

The source for this power to revoke charitable exemptions and deductions for certain violations of federal public policy was initially revealed in a series of cases and revenue rules and procedures during the 1970s. The first of these developments came in the case of Green v. Connally (330 F. Supp. 1157 (D.D.C. 1970)).

The case was instituted as a class action by black students and parents in 1969. They sought to enjoin the IRS from granting tax-exempt status to some private schools in Mississippi that had been discriminating against blacks in admissions. In order to stop the defendant schools from further discrimination, the plaintiffs sought declaratory relief and a permanent injunction. The district court held that private schools practicing racial discrimination are not entitled to tax exemption, and that people making gifts

to such schools are not entitled to the deductions for gifts to charitable educational institutions.

Subsequently, this well-researched decision was appealed to the Supreme Court in Coit v. Green (404 U.S. 997 (1971)). The high court affirmed the district court's determinations.

During the Green litigation, the IRS announced that it would no longer allow tax-exempt status and deductibility of contributions to any private schools that practiced racial discrimination. After Green this IRS announcement was formalized in a series of revenue rules and procedures. Thus, public policy on the issue was further strengthened.

The strength of the Green rationale and the validity of the IRS revenue rules and procedures have been re-examined in a more recent case, Bob Jones University v. United States. Bob Jones University is a religious educational institution with a Protestant-fundamentalist orientation. The university has had a history of troubles with the IRS over its racial policies. In this case the IRS had decided to revoke the university's tax-exempt status because of its policy against interracial dating. The university claimed that its policy was based on a religious rationale and that the IRS decision violated the First Amendment religious clauses. The court ruled, however, that there was no constitutional violation under these circumstances.

In coming to a decision on these issues, the Fourth Circuit Court in 1981 embraced the Green rationale and held that the university was subject to Revenue Procedure 75-50, 1975-2 Cum. Bull. 158. This procedure provides that in order to qualify for an I.R.C. 501(c)(3) exemption, a private school must be able to demonstrate that all of its programs and facilities are operated in a nondiscriminatory manner.

Bob Jones University appealed the adverse decision to the United States Supreme Court (Bob Jones University v. United States, Case No. 81-3) where it was combined with a similar case involving Goldsboro Christian Schools. In May 1983 the Court upheld the circuit court. In an 8 to 1 ruling the Court held that the IRS had not overstepped its authority in denying tax exemption status to Bob Jones University and the Goldsboro Christian Schools. It stated that the federal government has a fundamental interest in eradicating racial discrimination in education. Furthermore because this interest is compelling, it overrides whatever burden the denial of tax benefits would place on the exercise of the schools' religious beliefs. And in upholding the denial of exemption status, the Court also upheld the IRS disallowance of charitable deductions for donations made to schools that practice race discrimination.

TYPES OF CHARITABLE GIFTS: INSTITUTIONAL ISSUES

Many of the types of charitable gift issues that might be encountered by an educational institution have been discussed in Chapter 2 with respect to donors. From the viewpoint of the institution, however, there are important implications inherent in the acceptance and management of such gifts that require special analysis.

Gifts of real property

It is good policy for an institution to have a title search and otherwise investigate the ramifications of receiving particular real property before accepting it. Property subject to indebtedness may pose problems for an institution. A title search will reveal any liens on the property. Preferably, title should be clear of all restrictions on its use and on its alienation--that is, on the freedom of the institution to sell or convey the property. Likewise, any other condition that could tie the hands of the institution's trustees in dealing with the property should be avoided if possible.

Complications can also result if the property has any easements (someone else has the right of access to or through the property) or if there are any reservations of mineral, gas, or oil rights. The institution should alert the donor to possible tax complications. In situations where mineral, gas, or oil interests are reserved, because they are gifts of partial interests in real property, such remainder interests may fall under the charitable remainder trust rules. (See Chapter 2.)

These caveats should not deter an institution from attempting to negotiate with the donor the details of a gift. Frequently, for instance, a donor can be persuaded to convey the title in its simplest form (usually fee simple absolute) without restrictions. And some of the restrictive factors mentioned above may be manageable. The salient point is that the educational institution should be fully informed by its legal counsel about the ramifications of any particular gift of real property.

Other questions arise with gifts of income-producing property. Frequently, institutions receive apartment houses, stores, or land with minerals, gas, or petroleum. These gifts have special management, legal, and tax ramifications.

First, the institution must be in a position to manage the property. A professional manager, such as a real estate company, can be hired but the institution will still have

to review such a delegation. Second, the institution will have to deal with the tax ramifications of running any profit business. Nonprofit corporations are sometimes required to pay taxes on ancillary profit operations. The tax rules will have to be investigated and compiled with.

Gifts of personal property

As with gifts of real property, a gift of personal property may have legal or administrative ramifications that an educational institution should know about before accepting it. Generally, however, there are fewer complications in this category.

As with real property, it is best if gifts of personal property, tangible or intangible, are made without restrictions or conditions. Unless the object has scientific, historic, or artistic value and can be directly utilized by the institution (such as laboratory equipment or rare books), the institution will probably want to sell it. But if the donor is sensitive about what the institution will do with his or her property, the institution may risk losing the gift altogether unless it will accept restrictions or conditions.

Gifts of intangible property often need special legal attention. A gift of a copyright, patent, or trademark requires some method of monitoring and enforcing the rights associated with it. Stocks, bonds, or other securities require investment management. Details of fund administration and associated legal mandates are given below.

Gift valuation for tax purposes

Donors will want to take charitable income tax deductions for gifts to educational institutions. A donor must comply with Internal Revenue Code provisions when reporting any such gifts. In most cases these provisions clearly outline the guidelines for establishing the value of a gift. It is easier to put a dollar value on some types of gifts than on others. Cash, of course, poses no problem. Securities, such as stocks, are usually given their market value on the day they are donated. Other types of gifts may require professional appraisal. The value of a gift may be established if the institution sells it within a reasonable period after its donation. The sale price is usually the basis for establishing the amount of the deduction. In any case it is important to note that the donor has the major responsibility for substantiating the amount of the tax deduction if he or she is audited by the IRS.

What happens when the IRS decides to verify amounts taken as deductions by donors? Brigham Young University recently found itself in some difficulty when it refused to reveal to the IRS the names of donors to the university. (See the Chronicle of Higher Education, November 3, 1982 and December 11, 1982.) The IRS had audited 162 taxpayers who had claimed charitable deductions for gifts in kind (many were mines) to the university. Because the IRS had reason to believe that the gifts were substantially overvalued, it asked the university for the names of its non-cash contributors. When Brigham Young refused, the IRS sought a court order to obtain the list. The Tenth Circuit Court of Appeals upheld the district court's decision to support the IRS request. While an appeal was pending to the U.S. Supreme Court, BYU decided to turn over the names in order to avoid a contempt of court citation.

The university faced a real dilemma. It wanted to be cooperative, but it didn't want to turn over a complete list of all of its non-cash donors. It argued that it should not be placed in the position of a third party forced to supply information that would be used to apprehend abusers. BYU was not worried about the effect of the federal intervention on future contributions. However, it was concerned about how donors evaluate gifts. It was university policy to give all gift property the value of one dollar on the theory that it could not establish any other value until the property was leased or sold.

In response to the revelation that some donors had claimed inflated deductions, a university spokesman said that BYU would prefer not to accept any donation that was questionable. But usually there is no way of knowing whether a particular donor is cheating (donating worthless or overvalued property).

REGULATION OF FUND SOLICITATION

An area of increasing importance for the nonprofit sector is the regulation of gift solicitation. Society seeks to protect potential donors from unscrupulous practices by charities and nonprofit organizations in their competition for funds. While charitable gift solicitation has always been permitted in our society, solicitations have become increasingly subject to regulation under the police power of the government. Local, state, and federal regulations have been mandated to protect the public from fraud, deceit, and other abuses in the solicitation and use of charitable funds.

Generally, as with other regulatory provisions, the charitable solicitation regulations must be reasonable. In testing the

reasonableness of the regulations, the courts will weigh the relative advantages and disadvantages of the restrictions.

State and local regulation

During the last 30 years there has been a dramatic increase in the number of states that have passed charitable gift solicitation statutes. Over 30 states have such statutes today.

In the opinion of Fisch et al. (1974, p. 576), two factors have been responsible for the proliferation of these statutes. First, the amount of monies raised by charity has increased enormously over the years. Second, as the funds being raised have increased there has been a concomitant increase in abuses such as "charity rackets," i.e., bogus or unscrupulous charities that use deceptive solicitation practices. (See "Charitable Solicitation Acts--An Attempt to Curb Charity Cheats," DePaul Law Review, 16:472, 1966-67.) States have felt it necessary to provide closer supervision of the charity industry with respect to gift solicitation.

Two surveys of charitable gift solicitation statutes (Fisch et al., 1974, pp. 578-583, and 1980 pocket part, p. 101; Hopkins, 1975, pp. 289-305) found three basic types of regulation--licensing, registration, and reporting. In general, licensing statutes, requiring state authorization to solicit gifts, are the most powerful because they more closely regulate the activity and give officials the broadest discretion in assessing an organization's eligibility to ask for gifts. Registration statutes usually only require the recording or enrollment of the name of the fund raiser and/or organization. Reporting statutes require the organization to file an official statement of its activities and finances.

Iowa, Kansas, Maine, and North Dakota have licensing statutes. North Dakota also requires that charities register. Twenty states in all have a registration requirement; the states are Arkansas, Connecticut, Florida, Georgia, Hawaii, Massachusetts, Maryland, Minnesota, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wisconsin.

Both licensing and registration statutes vary in detail as to who must be licensed or registered (the organization or the professional fund raiser), when licensing or registration must occur, and duration of the right to solicit.

Exemptions from licensing or registration may be granted when the organization's goal will not exceed a certain amount or there will be a limited number of contributors. And some states exempt certain types of organizations.

In 1975 and again in 1980, Bruce Hopkins surveyed the state statutes regarding exemptions for educational institutions (p. 289 and p. 3 respectively). Hopkins found that "only four states exempt accredited educational institutions from the entirety of their charitable solicitation acts." These states are Hawaii, North Dakota, Oregon, and South Dakota. According to Hopkins, "The far more common practice is to exempt accredited educational institutions from the registration or licensing requirements. Sixteen states have adopted this approach." These states are Connecticut, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, and West Virginia. According to Hopkins, "Nine states, either as an alternative or in addition to the foregoing approach, exempt from the registration or licensing requirements educational institutions that confine their solicitations to their 'constituency.'" These states are Georgia, Illinois, Kansas, New Jersey, New York, North Carolina, Ohio, Virginia, and Wisconsin.

Foreign charities, that is, those in a state other than the one making the requirement, must register in about 40 percent of those states that require charitable registration (Fisch et al., 1974, p. 588). This means that institutions with a broad constituency may have to comply with registration requirements in a number of states. However, colleges and universities seeking to solicit funds in another state may be exempt from registration in a state that exempts its own educational institutions.

Some of the states that exempt educational institutions from registration or licensing statutes may require that the same information be furnished to the state department of education. This information is required under the education code of some states.

The third method by which states regulate gift solicitation is by reporting requirements. Financial reports are required by the majority of regulatory statutes. The information required varies by statute. Some states have mandated the maintenance of detailed books. Pennsylvania's registration statute, for example, requires a yearly financial report including a copy of a balance sheet, an income and expense statement, and detailed information about fund-raising activities during the year (10 PA. CONS. STAT. ANN. 160-3 (a)(6) (Purdon)).

Enforcement and sanction provisions typically accompany regulatory statutes and may specify a graduated series of fines and/or imprisonment, with more severe sanctions for repeat offenders.

Other state statutes that may be relevant to fund raising are those prohibiting fraudulent practices, regulating the

offering of securities (blue sky laws), and regulating the offering of gift annuities (insurance statutes).

In addition to state regulations, a number of municipalities have ordinances that regulate local gift solicitation. These regulations vary just as state regulations do.

It is imperative that fund-raising activities comply with both state and local requirements. Institutional counsel should review the relevant mandates for registration, licensing, and financial reporting requirements.

College and university fund raisers should also be aware of state regulations regarding the practice of law. Development officers may sometimes find themselves in the position of advocating to potential donors certain tax or estate planning advantages in making a gift to the institution. Does this constitute the practice of law? Many aspects of giving involve considerable legal ramifications. Certain types of gifts have both tax and estate planning implications and a professional fund raiser should be able to provide enough information for the donor to make an informed decision. But if the fund raiser is not careful, he or she may be potentially guilty of practicing law without a license. The delicate nature of the problem is compounded by the fact that it would be ethically questionable for institutional counsel to give advice to the donor because of potential claims of conflict of interest.

In some states conviction for the unlawful practice of law carries a fine and/or imprisonment. What constitutes the practice of law is necessarily defined by statutory and case law. Accordingly, educational fund raisers should ask their institutional counsel to check the pertinent state law. It is also good practice to urge prospective donors to consult their own lawyers before undertaking an arrangement that may contain legal consequences.

Federal regulation

At present state law plays the major role in the regulation of gift solicitation. The federal government has played a lesser role to date, but because of the implications of interstate transactions it may assume a greater role in the future.

Both Fisch et al. (1974) and Hopkins (1975) comment on the potential for federal regulation of interstate charitable gift solicitation. Fisch et al. state:

Until Congress closes the field to state action by comprehensive legislation of charitable solicitation

the states are not precluded from exercising their police powers in matters which might affect interstate commerce. (p. 591)

Bruce Hopkins (1975, pp. 311-13) suggests that there has been a growing sentiment in favor of federal interstate regulation of charitable solicitation. He cites a number of bills that were pending at the time of his article. While these bills and subsequent attempts to produce greater federal involvement failed, this does not preclude the emergence of a dominant federal role in certain areas, such as the use of the mails in soliciting donations.

REGULATION OF FUND ADMINISTRATION

The influence of public policy on the administration of private donor funds can be seen on both the state and the federal level. On the state level a considerable number of equitable and common law principles apply to the supervision of trusts and trust funds. A major manifestation of this fact is the power of courts to intervene in the administration of charitable trusts. Apart from the traditional judicial powers in this area, a variety of statutory mandates govern different aspects of fund administration.

On the federal level, additional statutes and administrative regulations influence, either directly or indirectly, the administration of private donor funds.

Charitable trustees: Duties and powers

The essence of any trust, charitable or otherwise, is a relationship of confidence that has been established to accomplish a particular purpose. Trust relationships entail fiduciary duties that require a particular standard of conduct with regard to the trust property. By law charitable trustees are responsible for several duties. Luis Kutner (1970, pp. 186-188) classifies these duties as follows:

1. the duty of loyalty;
2. the duty not to delegate to others the doing of acts which the trustee can reasonably be required to perform;
3. the duty to render clear and accurate accounts with respect to the administration of the trust and to furnish to the beneficiaries . . . accurate information as to the administration of the trust;

4. the duty to make an accounting in regard to a charitable trust . . . includes an obligation to periodically report to the public on the activities of the trust
5. the duty to exercise reasonable care and skill;
6. the duty to see that the funds committed to the trustee's care are used for the purposes intended;
7. the duty to keep the trust property separate from the trustee's individual property, use care in selecting a bank . . . and properly earmark the deposit;
8. the [possible] duty to assure that the trustee's action does not jeopardize the tax-exempt status of the trust.

Kutner comments that the last duty could be considered implicit within the notion of fiduciary duties (even though it was not judicially mandated at the time of his analysis).

While the sources of authority for charitable trustee duties vary from state to state, there is a considerable amount of uniformity among the states. And a number of states have adopted uniform acts that codify the law.

Once the duties of charitable trustees have been established, the powers of the trustees must be outlined. Trustees must be granted sufficient authority and discretion to carry out their duties and to feel secure in their role. A charitable trust instrument should outline the trustee's authority. As a general rule, the courts will not interfere with a trustee in the exercise of his or her fiduciary discretion unless there has been an abuse of that discretion.

If the trust instrument does not clearly delineate the trustee's powers, rules of equity have traditionally done so. Some states have enacted statutes that outline what a charitable trustee may do. Nonetheless, because of the need for more uniform treatment of charitable trust law, there have been some attempts to provide consistency in the codification of that law.

The first attempt was the Uniform Trustee's Powers Act, drafted in 1964 by the National Conference of Commissioners on Uniform State Laws. As of 1983, it had been adopted in 11 states, Florida, Idaho, Kansas, Kentucky, Maine, Mississippi, Montana, New Hampshire, Oregon, Utah, and Wyoming. Then the Uniform Supervision of Trustees for Charitable Purposes Act was adopted by four states, California, Illinois, Michigan, and

Oregon. Both acts outline powers and duties of charitable trustees.

With this background in mind, let us examine specific aspects of the duties and powers of charitable trustees. One primary responsibility of the trustee is to administer and invest the funds that make up the corpus of the trust. Some of the most significant problems for an educational institution serving as a charitable trustee have arisen in connection with investment decisions.

In the 19th century there were two major standards for investment decisions by charitable trustees: the legal list (a statutorily designated list of permissible safe investments) and the prudent investor rule (giving broader discretion to the trustee).

According to Kutner (1970, pp. 233-237), during most of the first half of the 20th century the more restrictive legal list concept predominated, but after 1940 a more permissive attitude evolved. Thus, the prudent investor rule, as elaborated in 1830 in Harvard v. Amory (9 Mass. (Pick.) 446), has become generally accepted only in the last several decades. This acceptance can be seen in the statutory modification or repeal of the statutory legal lists, as well as in judicial adoption of the Harvard College case rationale.

Kutner (1970, p. 236) attributes this change in judicial attitude to the impact of inflation. Common stocks, while not producing much income, had increased in value and had become a much more desirable type of investment in times of inflation. In addition, regulation of securities through federal SEC rules and state blue sky laws made common stocks less of a speculative investment.

One evidence of the increased acceptability of the prudent investor rule as the legal standard for charitable trustee investment behavior is its adoption by the Restatement of the Law of Trusts (Second):

In the making of investments of trust funds the trustee is under a duty to the beneficiary . . . to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived;
(1959, section 227, p. 529)

Various states have enacted statutory versions of the prudent investor rule. The Pennsylvania version permits directors of nonprofit corporations (including educational institutions) to invest "in such investment as in the honest exercise of

their judgment they may, after investigation, determine to be safe and proper investment, and to retain any investments heretofore so made" (15 PA. CONS. STAT. ANN. 7306 (Purdon)).

In the past, the absence of guidelines on other investment-related issues was troublesome for many trustees. For instance, the law was silent on the degree to which institutional fund management could be delegated. And there were few guidelines as to whether capital gains from institutional funds should be spent or reinvested.

One major solution to these problems was developed in 1972 by the National Conference of Commissioners on Uniform State Laws, which drafted the Uniform Management of Institutional Funds Act. The portions of the act that are most pertinent to a college or university's investment policy are:

Section 2. [Appropriation of Appreciation.] The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund . . . as is prudent under the standard established by Section 6

Section 3. [Section 2 does not apply if the donor states that the net appreciation should not be expended.]

Section 4. [Investment Authority.] . . . [T]he governing board . . . may: (1) invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board . . . (4) invest all or any part of an institutional fund in any other pooled or common fund available for investment, ...

Section 5. [Delegation of Investment Management.] Except as otherwise provided by the applicable gift instrument . . . the governing board may (1) delegate to its committees, officers or employees, [etc.] . . . the authority to act in place of the board in investment and reinvestment of institutional funds, (2) contract with independent investment advisors, [etc]

Section 6. [Standard of conduct.] . . . [M]embers of a governing board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision

The prefatory note to the act says, "The standard of care is that of a director of a business corporation--which seems more appropriate than the traditional Prudent Man Rule applicable to private trustees." Thus, institutions are held to a stricter standard under this rule but not nearly as strict as that of the legal list concept.

Section 7. [Release of Restrictions on Use of Investment.] (a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use of investment of an institutional fund. (b) If written consent of the donor cannot be obtained by reason of his death, disability, [etc.] . . . the governing board may apply in the name of the institution to the [appropriate] court for the release of a restriction imposed by the applicable gift instrument on the use of investment of an institutional fund If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part (d) This section does not limit the application of the doctrine of cy pres

As of 1983, the Uniform Act had been enacted in 26 jurisdictions: the District of Columbia, California, Colorado, Connecticut, Delaware, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, Tennessee, Vermont, Virginia, Washington, and Wisconsin.

An institution in a state that does not operate under the Uniform Act must examine the pertinent acts or regulations. Corporation not-for-profit acts or charities codes may have some guidelines as to the management and investment of private donor funds. Institutional legal counsel should fully inform the development and business offices, as well as the trustees, about the technicalities of the particular jurisdiction.

Charitable trustees and restrictive gifts

Gifts made to educational institutions frequently come with restrictions. For instance, a donor may designate that a scholarship fund be established for the benefit of a certain category of student. When the category is racial, sexual, or religious, the institution may encounter legal problems in the administration of the fund.

Whenever a charitable trust (such as an endowed scholarship fund) is administered by a public trustee (for a public insti-

tution of education or by an agency of the government), the administration may be considered "state action." Thus, if a trust instrument discriminates arbitrarily on the basis of race or creed, it may be attacked on the grounds that it violates the Fourteenth Amendment.

Again, the will of Stephen Girard provided a leading case, Pennsylvania v. Board of Directors of City Trusts (353 U.S. 230 (1957)). Girard's will, which created Girard College, restricted admission to "poor white male orphan children." This clause was tested in the mid-'50s when two black applicants were denied admission. Suit was instituted in the Orphans' Court by the mayor of Philadelphia and the attorney general of the state to clarify the rights of the applicants.

The plaintiffs argued that the will's restriction violated Pennsylvania state and federal public policy. They asked for alteration of the will's provision under cy pres; the court refused their petition on the grounds that the trust had not failed because of illegality or because of a shortage of white applicants.

The case was eventually appealed to the Pennsylvania Supreme Court which upheld the denial of relief. On further appeal, however, the United States Supreme Court determined that the city of Philadelphia in its capacity as trustee was acting as an agent of the state and that, by refusing to admit the black applicants, it was discriminating on the basis of race in violation of the Fourteenth Amendment.

In addition to the constitutional prohibitions against administering discriminatory trusts, there are other federal mandates, mainly statutes and regulations, that serve to regulate the administration of restrictive trust provisions by both public and private institutions of higher education.

Both public and private colleges and universities receive federal funds through a variety of direct and indirect grants and contracts. Title VI of the Civil Rights Act of 1964 has been the mainstay of a federal policy that institutions receiving federal funds must not discriminate in the funded activities. Federal agencies can enforce this policy by funding cutoffs for noncompliance.

Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) reads:

No person in the United States shall, on the ground of color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The relevant administrative rules (45 C.F.R. 80.3(b)) pursuant to Title VI are administered by the Department of Education. They provide:

(b) Specific discriminatory actions prohibited.

(1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to . . . separate treatment in any manner related to the receipt of any financial aid, . . . under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage . . . enjoyed by others receiving . . . financial aid, . . . under the program;

(v) Treat an individual differently from others in determining whether he satisfied . . . condition[s] which individuals must meet in order to be provided . . . financial aid, . . . under the program;

The second major relevant statute is Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) which states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, [with several exceptions]

The pertinent Department of Education regulations (45 C.F.R. 86) specify in greater detail the specific acts of sexual discrimination that are prohibited in programs receiving federal aid.

Title VI regulations strictly ban the administration of race and color restrictions. Title IX regulations, however, are seemingly not as comprehensive. For instance, the regulations state:

(a) General, Except as provided in paragraphs (b) . . .
. in providing financial assistance to any of its students, a recipient shall not: (1) On the basis

of sex, provide different amounts or types of such assistance, limit eligibility for such assistance . . . or otherwise discriminate;

(b) Financial aid established by certain legal instruments. (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments . . . which requires that awards be made to members of a particular sex specified therein; Provided, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

The Department of Education is the primary enforcement agency with regard to charges of administration of restrictive scholarships, but another major method for dealing with Title VI and IX violations is through the federal tax law--as we saw above, the IRS can revoke tax-exempt status for violation of public policy.

If the federal government takes steps to tighten the regulations and their enforcement, what will become of charitable trusts with restrictive scholarship funds established by private donor gifts? How can a charitable trustee bring a provision into line with prevailing policy?

There are some judicial remedies that have been used to correct restrictive trust instruments. First, courts have used the rules of judicial construction or interpretation to vitiate the effect of gift restrictions. Second, the cy pres doctrine provides a major means of modifying provisions that are impracticable or impossible to administer because of "illegality"--that is, they are in violation of public policy.

In Ebitz v. Pioneer National Bank (361 N.E. 2d 225, 226 (Mass. 1977)) several female law students had applied for financial aid from a scholarship fund that was established to "aid and assist worthy and ambitious young men to acquire a legal education." Using judicial rules of interpretation, the court decided that in the context of the complete document the term "men" was to be construed in its generic sense to include women. The Massachusetts Supreme Court affirmed this construction.

The use of cy pres can be seen in a case we discussed earlier, Howard Savings Institution of Newark v. Peep (34 N.J. 494, 170 A. 2d 39 (1961)), in which Amherst College trustees refused to accept a charitable trust fund unless a Protestant

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Gentile restriction was eliminated. The plaintiff executor instituted an action in equity to have the words excluded from the provision. The New Jersey Supreme Court affirmed the court's application of cy pres to alter the terms of the trust.

The IRS and fund administration

In conjunction with its power to allow a donor a charitable tax deduction or to revoke an institution's tax-exempt status, the IRS plays another potentially important role in the regulation of the administration of private donor funds by educational institutions. It does so by requiring tax-exempt institutions and charitable fiduciaries to file returns and information. Form 990A, Return of Organization Exempt from Income Tax, is designed to allow the IRS to scrutinize the nature of an organization's activities. The information required under the current law was discussed earlier in this chapter. Additional specific tax or information returns must be filed with regard to certain types of trusts. Revenue Procedure 73-29 specifies the types of returns that must be filed with these trusts.

Chapter 4

ENHANCING FUND RAISING IN THE LEGAL CONTEXT

Up to this point we have discussed educational fund raising in the legal context. We have seen that the legal restrictions and restraints that have been established for giving to schools, colleges, and universities are the product of many centuries of development. Most of these standards as to what the donor or the institution may do will continue to prevail for some time to come; others will be changed.

This chapter discusses the posture an educational institution should adopt with regard to the operation of the law of charity. More specifically, it addresses the need for positive strategies to enhance fund raising by influencing the development of the law of charity.

IMPROVING THE PUBLIC IMAGE

It should be evident at this point that the law of charity developed in response to the needs of society. Society has encouraged the private sector to support educational institutions but, at the same time, it has placed some restrictions on how they raise and use funds.

As any fund raiser knows, good public relations is necessary to a successful institutional advancement program. Every institution should strive to project a good image, not only to potential donors but to the general public as well. This requires the development of a program to increase the public's awareness of the value of schools, colleges, and universities and the education they provide.

When the positive image of educational institutions is maintained and enhanced, incentives for giving will continue to be established in the law. In this favorable atmosphere, legislatures will continue to create tax advantages for donors, and courts will continue to uphold educational gifts and trusts.

The same strategy is needed to minimize the legal restrictions on fund raising. A good public image can avert or lessen the amount of legislative, executive, or judicial interventions into the arena of nonprofit fund raising. One activity that has great potential in this effort is a program of self-policing.

The ethical standards of professional educational fund raisers are quite high. Fortunately abuses are rare but they do

happen. Institutions need to cooperate in establishing and enforcing a code of ethics. This would help prevent the kinds of abuses that in the past have resulted in increased societal regulation through the proliferation of charitable gift solicitation statutes.

The idea that charities can police their own fund-raising practices is one that has not been extensively promulgated. But I believe it is time that schools, colleges, and universities, either individually or through associations such as Independent Sector (IS) and the Council for Advancement and Support of Education (CASE) espouse the ethics of educational fund raising. Heightened awareness of strong professional ethics and effective enforcement mechanisms should prevent the occurrence of most abuses.

I would also suggest that some form of membership review could be instituted by IS, CASE, and other nonprofit associations. A model for controlling abuses by creating sanctions, such as censure, is available in the professional ethics review procedures of the American Medical Association or the American Bar Association. The American Association of University Professors also uses censure in the review and reporting of college and university actions involving academic freedom and personnel decisions. In the same fashion, complaints about fund-raising activity could be made available to the public. Of course all complaints would have to be verified and the institutions given a chance to respond. Censure, as a sanction, should be used only in situations where the abuse is intentional, blatant, or repeated.

Specific strategies to deal with the public and with various levels of the government are outlined below.

INCREASING PUBLIC AWARENESS

During the late '70s the National Council on Philanthropy (NCOP) and the Coalition of National Voluntary Organizations (CONVO) merged to form Independent Sector (IS). IS represents a number of major educational associations such as CASE, the National Association of Independent Colleges and Universities, and the Association of Governing Boards of Universities and Colleges, as well as many other nonprofit groups. IS, CASE, and other similar associations have as one of their main purposes the goal of educating the public and other constituencies about the importance of voluntary support for improving the quality of life. As part of this function, IS and CASE both disseminate to their memberships information about pending legislation and other governmental activity of importance to the nonprofit sector.

Educational institutions can work through organizations such as IS and CASE, as well as through their own institutional public relations efforts, to increase public support for governmental incentives for giving.

INFLUENCING LEGISLATION

As part of the effort to educate the public and other constituencies, IS and CASE disseminated information about legislation such as the nonitemizer charitable deduction, discussed above. Efforts to obtain its passage were aided largely through the promotional activities of IS. Attempts to gain passage of the nonitemizer deduction had gone on for over five years, and during that entire time IS was working in the wings to supply the additional stimulus that finally helped secure the enactment of the deduction.

Testifying before legislative committees on important issues such as this one and informing and lobbying for favorable changes in the law are vital in influencing legislation.

By law nonprofit organizations are limited in the amount of lobbying they may do. Since 1934 the law has restricted activities of nonprofit organizations designed to influence legislation. Institutions that receive tax-deductible gifts may not devote "a substantial part" of their activities to "attempting to influence legislation" (I.R.C. 501(c)(3) and (h)), and this includes both direct attempts and indirect or grass roots activities. The Internal Revenue Code (I.R.C. 501(h)) has defined a "substantial part" in terms of a "ceiling amount." The penalty for violating this provision is loss of tax-exempt status. In 1975 the Filer Commission, also known as the Commission on Private Philanthropy and Public Needs, recommended a number of reforms. Among them was this one:

That nonprofit organizations, other than private foundations, be allowed the same freedom to attempt to influence legislation as are business corporations and trade associations, that toward this end Congress remove the current limitation on such activity by charitable groups eligible to receive tax-deductible gifts. (p. 26)

As of 1983, the Filer Commission recommendation had not been adopted. If this prohibition against lobbying were to be removed from federal law, the potential for a strong and unified effort to promote changes in public policy by nonprofit organizations might be realized. The results could be dramatic.

Such power may not be readily granted, however. A resurgence of distrust for nonprofit organizations could effectively halt any chance for colleges and universities and other nonprofit organizations to gain influence through lobbying.

The viability of a public policy that restricts the political activity of nonprofit organizations was demonstrated in Regan v. Taxation with Representation of Washington (Case No. 81-2338, May 1983). In that case, the United States Supreme Court upheld the constitutionality of I.R.C. Section 501(c)(3). The court decided that the IRS had properly denied exemption status to Taxation with Representation, a nonprofit veterans organization whose primary activity was political. It ruled that the provision did not violate the First and Fourteenth (equal protection clause) Amendments. Thus, a judicial challenge was unsuccessful in promulgating this needed change in public policy.

On the other hand, the nonprofit sector did successfully oppose an increase in restrictions on lobbying activity. The Office of Management and Budget had proposed rules to limit lobbying by nonprofit organizations that received federal funds. The prohibitions were aimed at preventing the direct or indirect use of federal funds for political purposes. However, the resulting flood of complaints from affected organizations was so great that the agency withdrew the proposed rules for additional consideration. Subsequently, the OMB published a modified provision, which was also attacked by the American Council on Education and more than 60 other nonprofit organizations as being "unnecessary" in view of existing federal rules limiting lobbying activities.

It is obvious that the nonprofit sector, either through IS or other means, needs to construct a unified strategy: (1) to assure the public that the independent sector is above reproach, and (2) to persuade the public, Congress, and the courts that, as the Filer Commission has recommended, it should have more of an opportunity to influence legislation. Because of its diverse elements, mobilizing the nonprofit sector has always been difficult. But now more than ever, nonprofit organizations need to marshal their forces for a coherent approach. IS could provide the vehicle for the approach.

In addition to the efforts of organizations such as IS and CASE, some individuals have worked to inform and mobilize public opinion on behalf of the nonprofit sector. Conrad Teitell and his organization, the Philanthropic Tax Institute, promote educational and charitable fund raising through tax and estate planning seminars, newsletters, and other materials. These materials and programs are designed to assist charities in their development and fund-raising

programs. Teitell is a lawyer and a tax expert. On several occasions he urged the organizations that receive his newsletter to write Congress and government officials about pending legislation and to urge a particular course of action.

UTILIZING THE COURTS

We have already discussed two major ways in which educational institutions can use the courts to enhance educational fund raising: modifying or upholding specific gift situations and changing general public policy. Chapters 2 and 3 have shown how the courts have supported charitable giving by applying cy pres to revise charitable trusts and by enforcing charitable subscriptions. But court action should be a last resort. Educational fund raisers who are armed with a basic knowledge of the law should know when to use institutional legal counsel to prevent the need for resorting to the courts.

If a gift transaction seems technical or otherwise complicated by circumstances (conditions or restrictions, for example), legal counsel is needed. Legal counsel can assist in negotiating gifts and trusts. This assistance may eliminate the need to seek judicial help. Frequently, however, the need for legal clarification could not have been anticipated at the time the gift was made.

It may be necessary to resort to the courts for clarification of a gift instrument. Competent legal counsel, either from the institution or from an outside firm, should be retained in any such proceeding.

Attempts to use the courts are not always successful. We discussed above two recent cases, Taxation with Representation and Bob Jones University, in which a challenge of an agency action did not persuade the court. More successful was the Independent Sector's challenge of IRS guidelines restricting tax-exempt groups from publishing congressional voting records (Magarrell, 1980).

In the '80s, the nonprofit sector has taken a more aggressive attitude and has challenged government regulations in a number of instances (Roark, 1980; Alpern and Fineman, 1980). These judicial challenges may be a sign of the emergence of nonprofit organizations as an increasingly vocal and potent force in the formulation of the public policy that affects them.

Dealing with the executive branch

The regulatory power of the executive branch of the federal government is becoming increasingly apparent. The Internal

Revenue Service, for example, plays a key role in: (1) suggesting new Internal Revenue Code provisions; (2) establishing regulations pursuant to the provisions; and (3) interpreting and applying the Code. It is important to remember that the IRS and other executive agencies do not exist in a vacuum. Numerous techniques can be used to influence the processes by which agencies formulate and execute the law. The most basic of these is the right to comment on relevant regulations, both before and after they are issued. Key individuals from the educational sector should testify before agencies on regulations affecting tax-exempt status, the charitable deduction, or other incentives or disincentives for giving.

Another technique is the letter or phone campaign. This technique was used successfully to urge the institution of the nonitemizer charitable deduction and to oppose OMB's proposal to limit lobbying by recipients of federal funds.

Another example of the influence of public opinion on the executive branch took place while the Bob Jones University case was being decided. The Justice Department had filed documents with the Supreme Court stating that the Treasury Department planned to grant tax exemption to Bob Jones University and the Goldsboro Christian Schools. The Reagan Administration was endeavoring to change public policy and revoke the IRS procedures that had been used originally to deny tax-exempt status to private institutions that practice race discrimination. Public reaction, for example by the NAACP, was so strong that several days later President Reagan issued a statement that proposed legislation to outlaw tax exemptions for organizations practicing race discrimination (Raines, 1983, p. 1).

Summary

The lesson to be learned from all this is that educational institutions need not remain passive spectators while the laws that rule them are formulated, executed, and applied. Educational institutions should take an active role in molding, changing, and using the law. Professor Robert D. Bickel (1979) urges:

Don't just learn the law, learn to shape it. Learn it in a way that you know what issues to raise with counsel and also in a way that you can constructively criticize and informedly improve the judicial and legislative decisions in your area of expertise. Realize your right to comment on federal regulations. Realize your right to present a position of advocacy to a court if you are involved in a law suit. Realize

that the decisions in which you may personally become involved or that you may hear about are all shaped by these principles of criticism and advocacy, hopefully through the utilization of good attorneys, but also through the important role you can play in that process. (p. 256)

We have before us a great opportunity to enhance the quality of education through fund raising. The better our institutions are, the easier it should be to obtain gifts from the private sector. Although the degree of support will always be determined, at least in part, by the value society puts on its educational system, a sound knowledge of the law can help fund raisers in their job of seeking out, obtaining, and using private donor funds.

BIBLIOGRAPHY

Legal Reference Works

- American Digest System. St. Paul, Minn.: West Publishing Co., 1981.
- Black's Law Dictionary. Rev. 4th ed. St. Paul, Minn.: West Publishing Co., 1968.
- Bogert, George T. Law of Trusts and Trustees. Rev. 2d ed. St. Paul, Minn.: West Publishing Co., 1977.
- Corpus Juris Secundum. Brooklyn, N.Y.: The American Law Book Co., 1960.
- Page, W. H. Page on the Law of Wills. Cincinnati: The W. H. Anderson Co., 1965.
- Pennsylvania Law Encyclopedia. Philadelphia: George T. Bisel Co., 1980.
- Restatement of the Law of Trusts, Second. St. Paul, Minn.: American Law Institute Publishers, 1959.
- Shepard's Citations. Colorado Springs: Shepard's Citations, Inc., 1981.
- Vale Pennsylvania Digest. St. Paul, Minn.: West Publishing Co., 1978.

Books

- Andrews, _____. Philanthropic Giving. New York: Russell Sage Foundation, 1950.
- Arthur Andersen & Co. Tax Economics of Charitable Giving. Chicago: Arthur Andersen & Co., 1979.
- Bremner, Robert H. American Philanthropy. Chicago: University of Chicago Press, 1960.
- Cary, William L. and Bright, Craig B. The Developing Law of Endowment Funds: "The Law and the Lore" Revisited. New York: The Ford Foundation, 1974.
- Cary, William L. and Bright, Craig B. The Law and the Lore of Endowment Funds. New York: The Ford Foundation, 1969.

- Chambers, M. M. Higher Education: Who Pays? Who Gains? Danville, Ill.: The Interstate Printers & Publishers, Inc., 1968.
- Charles Stewart Mott Foundation. Foundations: Scheduled for Extinction? Flint, Mich.: Charles Stewart Mott Foundation, 1981.
- Cobbett, William. The Parliamentary History of England. London, 1811.
- Commission on Private Philanthropy and Public Needs. Giving in America. Commission on Private Philanthropy and Public Needs, 1975.
- Corson, John J. The Governance of Colleges and Universities. New York: McGraw-Hill Book Co., 1975.
- Council for Financial Aid to Education. Voluntary Support of Education 1979-80. New York: Council for Financial Aid to Education, 1981.
- Curti, Merle and Nash, Roderick. Philanthropy in the Shaping of American Higher Education. New Brunswick, N.J.: Rutgers University Press, 1965.
- Dickinson, Frank G., ed. Philanthropy and Public Policy. New York: National Bureau of Economic Research, 1962.
- Dillion, D. Tax Impacts of Philanthropy. Princeton: Tax Institute of America, 1972.
- Duke, George. Law of Charitable Uses. London, 1676.
- Fisch, Edith L. The Cy Pres Doctrine in the United States. New York: Matthew Bender & Co., 1950.
- Fisch, Edith et al. Charities and Charitable Foundations. Pomona, N.Y.: Lond Publications, 1974.
- Friedman, Lawrence W. A History of American Law. New York: Simon and Schuster, 1973.
- Gray, B. Kirkman. A History of English Philanthropy: From the Dissolution of the Monasteries to the Taking of the First Census. London: P. S. King & Son, 1905.
- Halstead, Kent D. College and University Endowment: Status and Management. Washington, D.C.: United States Government Printing Office, 1966.

- Hopkins, Bruce R. and Meyers, John H. The Law of Tax Exempt Organizations. Washington, D.C.: Lerner Law Book Co., Inc., 1975.
- Jones, Gareth H. History of the Law of Charity 1532-1827. Cambridge, England: Cambridge University Press, 1969.
- Jordan, W. K. Philanthropy in England 1480-1660. London: George Allen & Unwin, Ltd., 1959.
- Kutner, Luis. Legal Aspects of Charitable Trusts and Foundations. Chicago: Commerce Clearing House, Inc., 1970.
- Marts, Arnaud C. The Generosity of Americans. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1966.
- Marts, Arnaud C. Philanthropy's Role in Civilization. New York: Harper & Brothers, Publishers, 1953.
- Miller, Howard S. The Legal Foundations of American Philanthropy 1776-1844. Madison, Wis.: The State Historical Society of Wisconsin, 1961.
- Newman, Edwin S. Law of Philanthropy. New York: Oceana Publications, 1955.
- Owen, David E. English Philanthropy 1660-1960. Cambridge, Mass.: Harvard University Press, 1964.
- Salamon, Lester M. and Abramson, Alan J. The Federal Government and the Nonprofit Sector: Implications of the Reagan Budget Proposals. Washington, D.C.: The Independent Sector, 1981.
- Teitell, Conrad. Outright Giving Techniques. Old Greenwich, Conn.: Philanthropic Tax Institute, 1976.
- U.S. Master Tax Guide [1980]. Chicago: Commerce Clearing House, Inc., 1979.
- Whitaker, Benjamin C. G. The Philanthropoid: Foundations and Society: Unsubsidized Anatomy of the Burden of Benevolence. New York: Morrow, 1974.

Periodicals

- Alpern, David M. and Fineman, Howard. "Churches, Politics and the Tax Man." Newsweek, p. 46, October 6, 1980.
- Annot. "Validity, Interpretation, and Application of Provisions of Will Making Devise or Bequest to or in

Trust for Religious or Educational Body Depending upon Adherence to Particular Body of Principles or Dogmas, or Ecclesiastical Connection." American Law Reporter, 120:971, 1939.

Apothaker, Louis D. "Sweet Charity . . . as Amended--a Review of Pennsylvania's Charitable Solicitation Law." Pennsylvania Bar Association Quarterly, 45:369, 1974.

Beckham, Joseph C. and Godbey, Galen C. "Conceptualizing Federal Tax Policies Towards Higher Education in the 1980s: Balancing Social Equity and Political Realities." Journal of Education Finance, 5:449, Spring 1980.

Bickel, Robert D. "Overview of Legal Responsibility of the College or University for Student Activities." Keynote address presented at law-education institute, Lehigh University, March 1979, as cited in Bargerstock, Charles T. and Zirkel, Perry A. "Two Current Legal Concerns in College Student Affairs." Journal of College Student Personnel, 21(3):252, May 1980.

Blackwell, Thomas E. "A Critique of 'The Law and the Lore of Endowment Funds.'" The College Counsel, 5(1):272, 1970.

"Charitable Solicitation Acts--An Attempt to Curb Charity Cheats." DePaul Law Review, 16:472, 1966-67.

Clark, Elias. "Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard." Yale Law Journal, 66:976, 1957.

Comment. "Remoteness of Vesting and the Charitable Trust." Fordham Law Review, 31:782, 1963.

Committee on Succession. "Restrictions on Charitable Testamentary Gifts." Real Property, Probate and Trusts Law Journal, 5:290, 1970.

Dahl, Randall. "Legal Problems in the Solicitation and Administration of Private Donor Funds in Higher Education." Kentucky University, Lexington, KY. ERIC Document ED 153-518, 1977.

Donaldson, Donald M. "Unique Legal Vehicles for Charitable Giving." West's Education Law Register, 13:7, March 10, 1983.

Fink, Norman S. "Taxation and Philanthropy--A 1976 Perspective." Journal of College and University Law, 3(1):1, 1975.

- Forer, Lois G. "Relief of the Public Burden: The Function and Enforcement of Charities in Pennsylvania." University of Pittsburgh Law Review, 27:751, June, 1966.
- Freed, Merrill, ed. "Supervision of Charitable Trusts." University of Chicago Law Review, 21:118, 1953.
- Gray, Robert L. "State Attorney General--Guardian of Public Charities?" Cleveland-Marshall Law Review, 14:236, 1965.
- Hook, Janet. "If Congress Cuts Arts and Humanities Budgets, Private Support Could Fall, Too, Critics Warn." The Chronicle of Higher Education, 22(3):14, March 2, 1981.
- Hook, Janet. "Plans to Limit Nonprofit Groups' Lobbying 'Went Too Far,' Budget Office Concedes." The Chronicle of Higher Education, 26(2):11, March 9, 1983.
- Hook, Janet. "U.S. Budget Unit Withdraws Proposals to Limit Nonprofit Groups' Lobbying." The Chronicle of Higher Education, 26(4):9, March 23, 1983.
- Hopkins, Bruce R. Preliminary Draft of Revised Survey from 1975 Article, supplied to author, p. 3, February 22, 1980.
- Hopkins, Bruce R. "Regulations of Interstate Charitable Solicitations: Implications for Colleges and Universities." Journal of College and University Law, 2(4):289, 1975.
- "Incentives to Charitable Giving Introduced in Congress." The Chronicle of Higher Education, 21(22):13, February 9, 1981.
- Karst, Kenneth. "The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility." Harvard Law Review, 73:433, 1960.
- Kutner, Luis and Koven, Henry H. "Charitable Trust Legislation in the Several States." Northwestern Law Review, 61:411, 1966.
- "Law and Philanthropy." Virginia Law Review, 46:3, April, 1960.
- Leach, W.B. "Perpetuities: Cy Pres on the March." Vanderbilt Law Review, 17:1381, 1964.
- Lynn, Robert J. "Perpetuities: The Duration of Charitable Trusts and Foundations." UCLA Law Review, 13:1074, 1966.

- Magarrell, Jack. "Corporations' Gifts to Colleges Up 25 Pct. in 1980: Smaller Increase Likely This Year." The Chronicle of Higher Education, 22(13):1, May 18, 1981.
- Magarrell, Jack. "Giving to Colleges Rises 13.9 Pct." The Chronicle of Higher Education, 18(13):3, May 21, 1979.
- Magarrell, Jack. "I.R.S. Changes Rule on Reporting of Voting Records." The Chronicle of Higher Education, 21(9):15, October 20, 1980.
- Magarrell, Jack. "Less Money, More Competition for Grants Seen by Foundations." The Chronicle of Higher Education, 21(11):1, November 3, 1980.
- Margarrell, Jack. "Study Shows Gifts to Nonprofits Must Rise 144 Pct. in 5 Years to Offset Cuts, Inflation." The Chronicle of Higher Education, 22(14):1, May 26, 1981.
- McGeorge, Ralph E. "Control of Charity Solicitations." Cleveland-Marshall Law Review, 14:265, 1965.
- Meyers, John H. "Recent Federal Tax Developments Affecting Colleges, Universities and Donors." Journal of College and University Law, 2(3):269, 1975.
- Moran, Gerald P. "Private Colleges: The Federal Tax System and Its Impact." Paper presented to the Center for the Study of Higher Education, Toledo, Ohio, 1977.
- "Mortmain Statutes: Questions of Constitutionality." Notre Dame Law Review, 52:638, 1976.
- Najarian, Clinton J. "Charitable Giving and the Rule Against Perpetuities." Dickinson Law Review, 70:455, 1966.
- Nelkin, Stuart M. "Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts." Georgetown Law Journal, 56:272, 1967.
- Orleans, Jeffrey H. and Johnson, Elizabeth D. "Nondiscrimination Doesn't Have to Not Work: Restrictive Scholarship, H.E.W., and I.R.S." Journal of Law and Education, 7(4): 493, 1978.
- Peters, John T. "Decade of Cy Pres: 1955-1965." Temple Law Quarterly, 39:256, 1966.

- Porth, William. "Legal Aspects of Gifts, Trusts and Legacies for Educational Institutions." The College Counsel, 3(2):208, 1968.
- Raines, Howell. "President Shifts View on Tax Rule in Race Bias Cases." New York Times, A26, January 13, 1983.
- Roark, Anne C. "Chemical Society Fends Off Challenge to Tax Exemption, Wins I.R.S. Ruling." The Chronicle of Higher Education, 21(16):11, December 8, 1980.
- Stewart, John T., Jr. "Legal Investments and the Prudent Man in Pennsylvania." Temple Law Quarterly, 37:121, 1964.
- Sunley, Emil M. "Federal and State Tax Policies," in Chapter 6 in Breneman, David W. and Finn, Chester E., eds. Public Policy and Private Higher Education. Washington, D.C.: The Brookings Institution, 1978.
- Tabakin, Lorraine S. "In re Estate of Cavill: Death of Pennsylvania's Mortmain Statute." University of Pittsburgh Law Review, 37:169, Fall, 1975.
- "Trusts and Estates--Charitable Trusts--Application of Rule Against Perpetuities and Doctrine of Cy Pres." Ohio State Law Journal, 37:685, 1976.
- Wheeler, John W. "Fiduciary Responsibility of Trustees in Relation to the Financing of Private Institutions of Higher Education." Journal of College and University Law, 2(3):210, 1975.
- Willard, Joseph. "Illustrations of the Origin of Cy Pres." Harvard Law Review, 8:65, 1894.

Dissertations

- Bargerstock, Charles T. "An Historical Legal Analysis of the Influence of Public Policy on Gifts from Individuals to Institutions of Higher Education." Doctoral dissertation, Lehigh University, 1982.
- Betts, Francis M., III. "The Development of Objectives for a Training Program in Fund Raising for Educational Administrators." Doctoral dissertation, University of Pennsylvania, 1978.
- Byars, Richard. "Decision Criteria for Gifts under the 1976 Tax Reform Act." Doctoral dissertation, North Texas State University, 1977.

Desmond, Richard L. "The Federal Tax History of Life Income Gifts to Higher Education." Doctoral dissertation, University of Michigan, 1965.

Gearin, Russell F. "The Administration of Trusts and Endowments in Schools of the United States." Doctoral dissertation, University of Arizona, 1970.

GLOSSARY

Accumulation: the process of allowing income or interest in a trust fund to be added to the principal rather than being distributed.

Action in ejectment: a common law action to secure both monetary damages and repossession of land being unlawfully held by someone else.

Alienation: the process of the transfer of real property to another.

Approximation: a doctrine, similar to cy pres, under equity that permits a judicial reinterpretation of a trust as it would have been intended by a grantor, if he or she had known that events would be different.

Attestation: the process of witnessing the execution of a will in order to authenticate its genuineness.

Blue sky laws: statutes that regulate the sale of securities or other investments, and that are designed to protect the public from schemes that have no more basis than so many feet of "blue sky."

Caveat: a caution.

Chancery: a court of equity, subject to the rules of equity, versus common law rules or principles.

Charitable remainder trust: a trust device under which a charity gains a remainder (i.e., subsequent) interest in the principal of a trust that was established for the lifetime of some other beneficiary (e.g., a spouse); for federal tax purposes, qualifying trusts receive special tax treatment.

Charitable uses or purposes: those designated by the society as deserving special treatment under the law as being charitable in nature.

Common law: principles of law established and later used as precedents by judges in the adjudication of legal disputes and controversies.

Condition precedent: something that must occur before a right or duty is to arise with regard to a trust, will provision, or contract.

Condition subsequent: something that when it occurs serves to divest a right or duty with regard to a trust, will provision, or contract.

Consideration: the basis of mutual assent, that which is bargained for; usually viewed in terms of a benefit to the promisor and/or some detriment to the promisee.

Corpus: the principal sum or capital of a trust, in contrast to the income it may produce.

Cy pres: a doctrine under the principles of equity whereby a court will direct that the purpose of a charitable trust should be altered, rather than having the trust fail, under circumstances where the carrying out of the original purpose has been prevented due to some impracticality, impossibility, or illegality.

Defendant: the party against whom a suit or action is brought.

Deviation: a doctrine, similar to cy pres, under which it is possible to seek the approval of a court to alter the means of administering a trust as opposed to altering the trust's purpose.

Dicta: an opinion of a court on matters not at issue in a suit; such opinions have no precedential value.

Endowment: the establishment of a corpus or fund for a nonprofit, charitable institution; usually only interest income is spent for institutional needs.

Equity: a system, in contrast to courts of law, for adjudicating disputes, where an adequate remedy is unavailable at law; has its own set of guiding principles and modes of relief.

Escheat: circumstances under which property would revert to the state.

Estoppel: a defense at law or equity that precludes a person from relief when his/her actions should justifiably deny the specific remedy sought.

Executory: the stage at which something has been agreed to or embodied in writing but not yet carried out or performed.

Fiduciary: a person who has assumed or is delegated a position of trust, e.g., a trustee.

Inter alia: Latin for among other things.

Inter vivos: Latin for between the living; for example, in a gift made by a donor during his life.

Intestate: a term used when one dies without a will.

Mortmain: translated as "dead hand"; refers to the control of property by a testator after his/her death via the will.

Mortmain acts: enacted in order to restrict the diversion of property from next-of-kin to a charity by one on his/her deathbed.

Plaintiff: one who brings a suit.

Pooled income fund: a method of pooling life income gifts under the auspices of a charity for the purpose of joint administration, investment, and distribution of income; a qualifying gift to such a fund is eligible for certain tax benefits under the Internal Revenue Code.

Power of appointment: may be established under a will that, at the testator's death, someone will be given the power to decide who will receive benefits from the estate.

Res: Latin for the "thing," the property, etc.

Rule against perpetuities: a rule as to future interests in property which states that "no such interest is good unless it must vest, if at all, not later than 21 years, plus a period of gestation, after some life or lives in being at the time of the creation of the interest." (Black's Law Dictionary, (rev. 4th ed.; St. Paul, Minn.: West Publishing Co., 1968, p. 1498))

Settlor: a person who establishes a trust.

Statute of frauds: an enactment designating that certain instruments (e.g., a trust), in order to be enforceable at law or equity, must be evidenced by a writing and endorsed by the relevant parties.

Subscription: in charitable terms, it is a pledge to contribute money or property, usually without receiving anything in return.

Superstitious use: in medieval times, it was the donation of property to a priest for the purpose of securing prayers for the benefit of the dead.

Testamentary: relating to a will, e.g., a provision.

Testator: one who has written a will.

Testatrix: a woman who has written a will.

Trust: an arrangement involving the transfer of property from one person to another who will manage it for the benefit

of a third person; entails fiduciary duties that are enforceable in a court of equity.

Trust indenture: a deed of trust involving more than two settlors.

Trustee: one who has been designated or appointed to administer a trust.

Trustor: one who has established a trust.

Use: establishes a beneficial interest that will be managed by another for the benefit of a third party; similar to a trust.

Vest: to establish an instant right to ownership or possession of property either currently or in the future.

NOTE ON THE AUTHOR

Charles Thomas Bargerstock received a Bachelor of Arts in History from Muhlenberg College in 1968, a Juris Doctor from the University of Pittsburgh in 1973, and a Doctor of Education from Lehigh University in 1982. During his graduate study in higher education administration at Lehigh, he was awarded the Lehigh Alumni Association Fellowship.

Bargerstock served as associate director of development at Davis and Elkins College. More recently he was assistant to the provost at Lehigh University. For the last two years he has been director of the Graduate Program in Higher Education Administration and assistant professor of education at Maharishi International University in Fairfield, Iowa.

Among Bargerstock's published research are articles in the Journal of College Student Personnel and the Journal of Student Financial Aid. With Dr. Perry A. Zirkel of the Lehigh University School of Education, Bargerstock co-authored the monograph, The Law on Reduction-in-Force: A Summary of Legislation and Litigation.

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